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IN THE :

Supreme Court of the United States

OCTOBER TERM, 1999

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, INC.,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a sovereign State, as an unwilling civil litigant in federal court, may be denied Fed. R. Civ. P. 60(b) relief to which it is otherwise entitled, on the theory that its earlier efforts to litigate its own claims arising under its own law in its own courts give it "unclean hands" so that "equity" requires denying the relief.

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PETITION FOR A WRIT OF CERTIORARI

The Kansas Public Employees Retirement System, Inc. ("KPERS") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on October 5, 1999.

OPINIONS BELOW

The Eighth Circuit's decision (App. 1a-6a)[1] is reported at 194 F.3d 922. The decision of the district court denying KPERS' motion for Fed. R. Civ. P. 60(b) relief (App. 7a-11a) is unreported.

JURISDICTION

The Eighth Circuit entered its judgment on October 5, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 60(b) of the Federal Rules of Civil Procedure provides in relevant part as follows:

Rule 60. Relief from Judgment or Order

* * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence, Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or

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[1] References to the Appendix to this Petition are styled "App. __a."

> discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. * * *

STATEMENT OF THE CASE

This case is one of several cases that have been filed by the State of Kansas through KPERS, its agency responsible for investing the retirement funds of its public employees. These cases all arise out of the huge losses suffered by KPERS, allegedly due to fraud and other wrongdoing by respondents and various other defendants, in connection with KPERS' direct placement and other venture capital investments made in the 1980s.

Common to all these cases has been the question under Kansas law of whether KPERS must satisfy the general statute-of-limitations periods applicable to claims brought by private parties. As to all cases except this case, the Kansas Supreme Court announced the controlling answer in a decision handed down on June 27, 1997: general limitations periods do not apply because KPERS' investment function is "governmental" rather than "proprietary" in nature. *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321,1328-43 (Kan. 1997). Under that ruling, all of KPERS' claims arising out of its losses from the venture capital investments it made in the 1980s are concededly timely.

Except, so far, the claims raised in *this* case. Unlike the other cases which have all been handled in Kansas state court, this case is in Missouri federal court as a result of respondents' manipulative forum-shopping efforts. In this case, the Eighth Circuit took up the threshold statute-of-limitations issue after the issue had been fully briefed and argued in the Kansas Supreme Court. Rather than waiting for that court's decision, as KPERS urged, the Eighth Circuit accelerated the oral argument and decision of this case, upheld dismissal of all claims as untimely, and immediately denied rehearing.

Due to the Eighth Circuit's accelerated oral argument, decision and denial of rehearing in the case, the dismissal of KPERS' claims

became final in the Eighth Circuit on June 20, 1997 — just seven days before the Kansas Supreme Court issued its non-accelerated ruling. That court unanimously held that all of KPERS' claims are timely as they all arise from governmental activity.

Thereafter, KPERS filed a motion under Fed. R. Civ. P. 60(b)(6) seeking to alter or amend the judgment to remove the statute-of-limitations dismissal. KPERS invoked a line of federal appellate cases authorizing Rule 60(b) relief upon a change in controlling state law where relief is needed to eliminate a disparity in the outcome of related cases, especially where that disparity is the result of the judgment loser having been deprived of its initial choice of a state-court forum that would have permitted an authoritative resolution of the issue, so that *Erie* principles cut in favor of relief in this narrow category of cases.

In its decision below addressing KPERS' Rule 60(b) motion, the Eighth Circuit assumed that KPERS had demonstrated circumstances generally warranting the Rule 60(b) relief it requested. But the Eighth Circuit rejected that relief based on KPERS' earlier efforts to keep this case out of federal court, or at least to obtain an authoritative statute-of-limitations ruling from the Kansas Supreme Court. It turns out that these efforts by KPERS to avoid any *need* for Rule 60(b) relief from an inconsistent outcome in related cases on an issue of state law have now been invoked as constituting a *bar* to such relief. To the Eighth Circuit, the efforts of an agency of the State of Kansas to have its claims arising under its own law decided in its own courts are to be viewed as giving it "unclean hands." The State of Kansas has thus been penalized for having asserted its sovereign interests. Whether Rule 60(b) and fundamental principles of federalism permit a denial of relief on such a theory is the issue presented here. The Eighth Circuit's decision conflicts with numerous decisions of this Court and of other circuits.

1. The Kansas State Trial Court's Statute-of-Limitations Ruling

This lawsuit was filed in Kansas state court on June 5, 1991, by the Kansas Attorney General, appearing on behalf of KPERS. KPERS is "a body corporate and an instrumentality of the State of Kansas." K.S.A. § 74-4903. It is part of a complex state statutory and administrative scheme created "for the purpose of effecting economy and efficiency in the administration of governmental affairs." K.S.A. § 74-4901. It is responsible for administering the pension funds of over 162,000 Kansas public employees through the State Treasurer's office. Pet. App., No. 97-471, at 32a.[2]

KPERS brought suit to recover $65 million, plus interest, that it lost as the result of alleged fraud and other misconduct in connection with its 1986 investment in a Missouri-based savings and loan named Home Savings Association. *KPERS v. Blackwell, Sanders, Matheny Weary & Lombardi, L.C.*, 114 F.3d 679, 683-84 (8th Cir. 1997) ("*KPERS VI*"). Named in the suit (either originally or in amended pleadings filed on December 23, 1991) were various respondents, including the former directors of Home Savings, who allegedly had made fraudulent misrepresentations to KPERS to induce KPERS to make its investment; KPERS' former investment adviser; and KPERS' former accounting firm. Other respondents were named later. *Id.* at 681-82, 684-85.

On March 17, 1992, several respondents moved in the Kansas state trial court to dismiss KPERS' claims on statute-of-limitations grounds, asserting that KPERS had made its Home Savings investment in a proprietary capacity, that the general statutes of limitations therefore applied to KPERS' claims,[3] and that all of

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[2] Various citations to unpublished district court decisions aside from the district court decision from which the instant appeal was taken, and citations to other materials from the record of the case, are to the appendices to previous petitions for certiorari filed by KPERS in this Court (identified by number), in which those materials were reprinted.

[3] Under Kansas common law, a governmental entity such as KPERS is not generally subject to any statute of limitations. *E.g.*, *State ex rel. Stephan v. GAF Corp.* 747 P.2d 1326 (Kan. 1987). By statute, Kansas has limited this rule to

KPERS' claims were barred by the two-and three-year statutes of limitations for tort and statutory actions, respectively (K.S.A. §§ 60-512, 60-513). *KPERS v. Reimer & Koger Associates, Inc.* ("*KPERS IV*"), 77 F.3d 1063, 1065 (8th Cir.), *cert. denied*, 519 U.S. 948 (1996).

On August 21, 1992, the Kansas state trial court issued an exhaustive opinion rejecting respondents' motion. It concluded that, under Kansas law, KPERS had made the Home Savings investment in a governmental capacity, and hence that no general statute-of-limitations period applied to KPERS' claims against respondents, so that all of KPERS' claims were timely. *KPERS v. Reimer & Koger Associates, Inc.*, No. 91 CV 786 (Dist. Ct. Shawnee County, KS, 7th Div., Aug. 21, 1992), slip op. at 30-31.

2. The First Three Years of Delay Caused by the Removal of this Case to Missouri Federal Court, Leading to an Erroneous Limitations Ruling

Five years later, the Kansas Supreme Court would unanimously agree with the trial court's conclusion that no general statute-of-limitations period applies to KPERS' claims, as KPERS' investments were made in a governmental capacity. But it would do so on an interlocutory appeal in other related cases that had been brought by KPERS, not in this case.

In this case, respondents elected not to seek interlocutory review of the Kansas state trial court's rejection of their statute-of-limitations argument. Instead, through what can most charitably be described as the use of a creative combination of third-party practice and a special removal statute, respondents managed to shift this entire litigation concerning KPERS' investment in Home Savings from state court in Kansas to federal court in Missouri. Then, even after the reason justifying the removal had disappeared, they convinced the Missouri federal district judge to keep the case,

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circumstances in which the entity is engaged in a governmental, as opposed to a proprietary, function. K.S.A. § 60-521.

even though it could never have been filed in any federal court.[4]

Having thus threaded the eye of a jurisdictional needle, once in federal court respondents moved *again* to dismiss the litigation as untimely, on this occasion with greater success. Disagreeing with the Kansas state trial court's view of Kansas law even as he admitted not understanding the pertinent Kansas law, the federal district judge in 1994 held that KPERS' claims were proprietary in

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[4] On October 2, 1992, several respondents filed a third-party petition against Home Savings' receiver, the Resolution Trust Corporation (RTC), alleging that the RTC had negligently mismanaged Home Savings and had lost money that could have been used to repay part of KPERS' losses; they also sought indemnification under 12 C.F.R. § 545.121. This pleading was ultimately dismissed as unmeritorious for failure to state a claim, see *KPERS v. Reimer & Koger Associates, Inc.*, No. 92-0922-CV-W-9 (W.D. Mo.), Order filed June 13, 1994, ¶¶ 5-7, but not before the RTC predictably invoked 12 U.S.C. § 1441a(*l*)(3)(A) to remove the entire case to the Western District of Missouri, where Home Savings had its principal place of business. Notice of Removal filed Oct. 13, 1992 (W.D. Mo.) (No. 92-0922-CV-W-9). Following the removal, KPERS promptly moved to remand the case on the grounds that the third-party claims asserted against the RTC had been properly severed from the lawsuit before the RTC removed the case and, in any event, that the third-party claims against the RTC were frivolous. The district court denied KPERS' motion, and the Eighth Circuit affirmed. *Kansas Public Employees Retirement Sys. v. Reimer & Koger Assoc., Inc.*, 4 F.3d 614 (8th Cir. 1993) ("*KPERS I*"), *cert. denied*, 511 U.S. 1126 (1994).

The RTC was then dismissed from the case on the ground that the third-party claims that had been brought against it were indeed meritless. At that juncture, KPERS again requested that the district court remand the case, citing the RTC's position that there was no reason for the case to remain in federal court. *See* Plaintiff's Supplemental Appendix, *KPERS v. Reimer & Koger Associates, Inc.*, 8th Cir. No. 95-3499, at 2 (statement of RTC's counsel that the RTC had removed the case only "[f]or the purpose of pursuing our motion to dismiss. Once that's accomplished, the [RTC's] motion [to dismiss the third-party complaint] is ruled on, the RTC no longer has a reason or standing to be in the case. That's why we intervened for a limited purpose. The RTC's out of the case, there's no longer basis for federal court jurisdiction and it goes back to state court."). The district court nonetheless elected to retain supplemental jurisdiction over the case under 28 U.S.C. § 1367, a decision that was upheld on appeal. *See KPERS IV*, 77 F.3d at 1067-68 (affirming district court's refusal to remand). Several respondents entered this litigation thereafter by intervening as defendants in the federal lawsuit.

character, and hence were subject to the general statutes of limitations.[5] Respondents then filed an interlocutory appeal that resolved the specific limitations periods applicable under Kansas law on the premise that KPERS' investment function was proprietary in nature.[6]

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[5] *See* Hearing of Apr. 28, 1994, in *KPERS v. Reimer & Koger Associates, Inc.* No. 92-0922-CV-W-9 (W.D. Mo.), Tr. at 40. The district court judge noted that KPERS was not subject to the general statutes of limitations "unless the cause of action asserted by KPERS arose out of a proprietary function or activity of KPERS as opposed to a governmental function," *id.* at 20, and observed that the Kansas state-court judge handling the case, Judge Theis, had "already ruled" that KPERS' functions were governmental in nature. *Id.* at 26. The district judge noted that Judge Theis had offered an "apparently very well thought out analysis" in his lengthy written opinion of some 64 pages, although the district judge also admitted, quite "frankly," that he "had trouble understanding it." *Id.* at 35. After issuing an oral ruling that covered just one transcript page in reaching a contrary conclusion, *id.* at 40, the district judge observed: "Now, I think it's appropriate at this point to concede the difference between the decision I just rendered in its length and the decision of Judge Theis." *Id.* at 40-41. The 1994 decision of the district court below thus "contained no analysis," as the Kansas Supreme Court later noted in unanimously agreeing with the result reached by Judge Theis. *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321,1338 (Kan. 1997).

[6] *See KPERS v. Reimer & Koger Assocs.*, 61 F.3d 608, 615 (8th Cir. 1995) ("*KPERS III*") (holding that "the Missouri borrowing statute requires the district court to apply the Kansas two- and three-year statute to KPERS' claims if the claims would be 'fully barred' by these statutes"), *cert. denied*, 516 U.S. 1114 (1996). KPERS appeared only as appellee in this interlocutory appeal. Having won below (the district court had in the end ruled in favor of KPERS, finding that all of KPERS' claims against all respondents were timely under a special ten-year statute of limitations expressly applicable to KPERS), at that juncture KPERS did not seek review of the district court's ruling that KPERS' investment function was proprietary within the meaning of Kansas law. When it was later forced to litigate that issue in the Eighth Circuit, after that court refused to defer to the Kansas Supreme Court on the issue, KPERS lost. *See KPERS VI*, 114 F.3d at 687-88.

3. The Injunction Entered Against KPERS Barring It From Obtaining a Definitive Statute-of-Limitations Ruling from the Kansas State Courts

At this point, having endured three years of federal litigation triggered by respondents' efforts to see the case removed to federal court, and their insistence that the district court exercise supplemental jurisdiction even after the predicate for removal was gone, see note 4, *supra*, and desiring to obtain an authoritative statute-of-limitations ruling from the Kansas appellate judiciary, KPERS asked the district court to certify to the Kansas Supreme Court the critical threshold issue of whether the relevant investment activities by KPERS were governmental as opposed to proprietary in nature. This the district court declined to do so. *See* Dist. Ct. Docket Entries 677 (9/12/95) and 761 (10/24/95).

Lacking any other option in this case to obtain an authoritative ruling on this contested issue, KPERS then filed parallel lawsuits against respondents in Kansas state court for the explicit purpose of providing a vehicle for obtaining interlocutory review of these issues from the Kansas Supreme Court. *KPERS IV*, 77 F.3d at 1066-67 (crediting the statement of counsel for KPERS "that KPERS filed the cases in Kansas because of a 'multitude of problems and issues that are causing delays in federal court, coupled with what we think is an erroneous decision by the 8th Circuit in interpreting the Kansas statute of limitations,'" and the district court's conclusion that KPERS filed these cases "'to attempt to obtain Kansas courts' more favorable rulings on the statute of limitations issue decided by the 8th Circuit'").

This avenue of relief was quickly blocked as well. Respondents filed motions in the Missouri federal court to enjoin KPERS from proceeding with these or any other state court actions against respondents related to the case pending in Missouri. *Id.* The district court immediately issued a TRO to prevent "KPERS from filing any further actions in the future" as a means "to avoid further disruptions of this case," finding that "[i]t undermines my ability to effectively manage this case to have claims asserted elsewhere." Pet. App., No. 96-113, at 17a. Over vigorous opposition from KPERS, *see id.* at 21a-35a, the district

court entered a preliminary injunction stating that in its view, the All Writs Act, 28 U.S.C. § 1651(a), authorized it "to enjoin duplicate cases from being pursued in other courts that would interfere with the processing of the pending case," as "the first court in which jurisdiction attaches has priority to consider the case" given the desirability of avoiding "multiplicity of litigation." Pet. App., No. 96-113, at 26a-27a. The Eighth Circuit affirmed. *KPERS IV*, 77 F.3d at 1067-71.

Relegated to litigating the threshold statute-of-limitations issue in this case in federal court, KPERS then briefed and argued the issues. In rulings issued on June 3 and July 25, 1996, the district court held that all of KPERS' claims against all respondents in this case were untimely because they had not been filed within the general limitations periods afforded private parties on the legal claims involved. Pet. App., No. 96-113, at 27a-73a, 80a-96a.

4. KPERS' Efforts to Convince the Eighth Circuit to Simply Await Decision of the Earlier Docketed Kansas Supreme Court Appeal on the State-Law Issue

As the district court was issuing its rulings dismissing the claims involving Home Savings that KPERS had been forced to litigate in Missouri federal court, further efforts were under way in Kansas to obtain an authoritative determination, for the entire array of litigation involving KPERS' investment activities, of the applicable limitation period for KPERS' claims.

On April 3, 1996, the Kansas state trial court in charge of the remaining cases brought by KPERS (concerning losses on approximately a dozen other investments) rejected all of defendants' claims that the cases were untimely. Memorandum Opinion and Entry of Judgment, *KPERS v. Reimer & Koger Associates, Inc.*, No. 93 CV 588; *KPERS v. Russell*, No. 93 CV 389; *KPERS v. Ward*, No. 92 CV 433A; *KPERS v. Byrd*, No. 92 CV 923; and *KPERS v. Cohen, Brame & Smith*, No. 92 CV 805 (Dist. Ct. Shawnee County, KS, 7th Div., Apr. 3, 1996). Among other rulings, the trial court reaffirmed its earlier analysis that, under Kansas law, KPERS is not subject to the general statutes of limitations, because its investment functions are governmental in

nature, not proprietary. *Id.* at 4, 18.

Three of the defendants who were adversely affected by this ruling in the Kansas cases are also respondents in this case. They (along with other defendants) promptly took interlocutory appeals from the Kansas state trial court's ruling in five of the cases pending before it. In light of the importance of the issues, the Kansas Supreme Court *sua sponte* transferred the interlocutory appeals from the intermediate appellate court to its own docket. *KPERS v. Ward*, No. 96-76524-AS (Kan. May 28, 1996). The consolidated appeals were fully briefed by November 1, 1996. On March 5, 1997, the Kansas Supreme Court heard oral argument.

The briefing schedule for KPERS' appeal from the district court's statute-of-limitations dismissal of its Home Savings claims ran several months behind the Kansas Supreme Court schedule. On several occasions during KPERS' Eighth Circuit appeal, KPERS requested that it defer to the Kansas Supreme Court in light of the advanced status of its pending consideration of an outcome-determinative issue that the Eighth Circuit had never before considered (see note 6, *supra*): whether or not KPERS' claims are governmental in nature within the meaning of Kansas law, and hence are exempted from the general Kansas statutes of limitations.

On December 12, 1996, KPERS filed its opening brief in the Eighth Circuit. KPERS began its argument as follows:

> This appeal concerns issues of Kansas law of first impression that are now before the Kansas Supreme Court in a fully-briefed appeal to which the Reimer & Koger, Shook Hardy and Blackwell Sanders defendants are all party. This Court should certify those issues to the Kansas Supreme Court or refrain from ruling on them until that Court decides the pending appeal.

Brief of Appellant (No. 96-3680) at 25. KPERS summarized the efforts of the parties in the consolidated Kansas litigation, and of the Kansas Supreme Court, to obtain a prompt and authoritative resolution of these issues of first impression, and argued that principles of cooperative judicial federalism required the Eighth Circuit either to certify the issue to the Kansas Supreme Court or

to stay its hand pending that court's ruling. *Id.* at 27-29. In an abundance of caution, KPERS also reiterated the arguments made to the Kansas Supreme Court as to why it "is exempt from general periods of limitations under Kansas law because it is a governmental entity engaged in a governmental function." *Id.* at 25; *see also id.* at 29-42.

On January 27, 1997, KPERS filed its Eighth Circuit reply brief, in which it informed the court that the Kansas Supreme Court had already scheduled oral argument in the consolidated appeals for March 5, 1997. Reply Brief of Appellant at 1 n.1. KPERS again emphasized the wisdom of "deferring decision" on the appeal until that court resolved the "pending, fully briefed appeal," arguing that any other course " would be abhorrent to the principles of federalism." *Id.* at 1. Further, rebutting the suggestion of appellees (respondents in this Court) that the Eighth Circuit could safely move forward because the proprietary nature of KPERS' investment function was supposedly "settled in Kansas," *id.* at 2, KPERS pointed out that several appellees had conceded the contrary in the Kansas litigation. *See, e.g., id.* at 2.

The Eighth Circuit declined KPERS' request to defer consideration of the case. Instead, on February 24, 1997, after the Eighth Circuit's calendar of March 1997 arguments had already been distributed to counsel, the court amended its calendar and ordered that oral argument be held three weeks later, on March 13, 1997. *See* Letter of Debbie Heusohn, Asst. Calendar Coordinator, to All Counsel of Record, February 24, 1997. At the March 13 oral argument, KPERS reiterated its request that the Eighth Circuit defer to the impending decision of the Kansas Supreme Court on the controlling issue of Kansas law.

Just two months later, on May 13, 1997, the Eighth Circuit issued its decision in this case. In affirming the district court's decision that all of KPERS' claims are time-barred, the Eighth Circuit rejected out of hand KPERS' argument that its underlying investment function involved a governmental function, so that it is exempt from the general Kansas statutes of limitations. *KPERS VI*, 114 F.3d at 687-88. The Eighth Circuit opined that "clear holdings" of the Kansas Supreme Court "compel rejection of

KPERS' argument." *Id.* at 688. The court's opinion did not address KPERS' repeated requests that, at the very minimum, the Eighth Circuit should defer decision of the case until after the Kansas Supreme Court decided the consolidated appeals on whether KPERS is exempt from the general Kansas statutes of limitations. The Eighth Circuit did address KPERS' suggestion that various issues of Kansas law, including the applicability of the general statutes of limitations to its investment function, be certified to the Kansas Supreme Court. It declined that course, again without any reference to the consolidated appeals then pending in the Kansas Supreme Court. *Id.* at 688 n.11.

On May 23, 1997, KPERS filed a rehearing petition arguing that the Eighth Circuit had ignored vital principles of federalism by failing to defer decision on this key issue even though "the Kansas Supreme Court found the issues so significant that it *sua sponte* transferred the pending appeals from the Kansas Court of Appeals to its own docket." Plaintiff-Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc, filed May 23, 1997, at 4-5. KPERS urged the Eighth Circuit, at the very least, to hold the rehearing petition in abeyance pending the Kansas Supreme Court's decision so that it could readily conform its judgment to any contrary decision from the Kansas Supreme Court.[7]

In response, the Eighth Circuit declined even this means of deferring ultimate resolution of the case pending the Kansas Supreme Court's decision in the consolidated appeals. On June 12, 1997, less than three weeks after KPERS filed its rehearing petition, the Eighth Circuit denied the petition without explanation

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[7] KPERS observed: "Should the Kansas Supreme Court reach a different conclusion on issues of Kansas law from those reached in *KPERS III* and this case, this Court will be obligated to correct its decision to conform it to the decision of the Kansas Supreme Court, even after the time for rehearing has expired and during the pendency of a petition for writ of certiorari. It would be wasteful and inefficient to force KPERS to seek further review of decisions that might well be mooted by an authoritative decision in Kansas simply because this Court reached its decision on issues of Kansas law more quickly than the Kansas Supreme Court." Petition for Rehearing at 5-6 (citing *Huddleston v. Dwyer*, 322 U.S. 232 (1944)) (other citations omitted).

or comment. Its mandate issued on June 20, 1997.

5. The Kansas Supreme Court's Controlling Decision, and KPERS' Efforts to Obtain Conformance With It

One week later, on June 27, 1997, three and a half months after it held oral argument, the Kansas Supreme Court issued its unanimous decision in the consolidated appeals. It agreed with the trial court's ruling made in this very case in 1992 (before it was removed to Missouri federal court) that KPERS' underlying investment function is governmental in nature, not proprietary — so that the general statutes of limitations do not apply and the entire array of litigation involving KPERS' investment losses is timely under Kansas law. *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321, 1328-43 (Kan. 1997). Concluding that "the actions of KPERS involved in this litigation are all governmental in character," *id.* at 1343, the Kansas Supreme Court stated that the Eighth Circuit's contrary conclusion was premised on a fundamental misunderstanding of Kansas law: the Eighth Circuit had "failed to recognize the distinction between governmental immunity cases and those involving statutes of limitations. It also failed to recognize that there is a significant distinction between a suit by employees to recover contractual benefits and a suit by KPERS arising from its investment activities." *Id.* at 1341.

On July 16, 1997, KPERS filed a second petition for rehearing, alerting the Eighth Circuit to the Kansas Supreme Court's decision and arguing that the Eighth Circuit was required to conform its judgment to that decision for two independent reasons.[8] First, KPERS argued that such action was necessary in light of the Eighth Circuit's earlier refusal to stay its hand in deference to the consolidated appeals in the Kansas Supreme Court, as a remedy to cure its earlier error. Plaintiff-Appellant's Second Petition for Rehearing and Suggestion for Rehearing En Banc, filed July 16, 1997, at 6-8. Second, KPERS argued that under a line of authority

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[8] This second petition was accompanied by a motion for leave to file it out of time or, in the alternative, to recall the mandate for the purposes of conforming the Eighth Circuit's decision to the recent decision of the Kansas Supreme Court.

beginning with *Huddleston v. Dwyer*, 322 U.S. 232, 235-38 (1944), even if KPERS had never apprised the Eighth Circuit of the pending Kansas Supreme Court appeal or requested that it stay its hand, The Eighth Circuit was required to conform its judgment to *any* intervening, controlling decision on a question of state law, as long as the party brings a rehearing petition within the time for petitioning for certiorari. *Id.* at 8-9.

In its second petition for rehearing, KPERS specifically urged the Eighth Circuit to act promptly to bring its judgment into conformance with the Kansas Supreme Court's recent decision, so as to spare the parties and this Court the burden of a petition for certiorari. *Id.* at 9. KPERS reiterated that request in a letter to the Court filed after a month and a half passed without a decision. *See* Pet. App., No. 97-471, at 25a-26a. As KPERS' petition for certiorari was going to press, on September 9, 1997, counsel for KPERS were orally advised by the Clerk's office of the Eighth Circuit that the second petition for rehearing had been denied, without opinion.

KPERS' petition for certiorari (No. 97-471) asked this Court to grant review of whether the Eighth Circuit violated principles of cooperative judicial federalism in its refusal to defer to the Kansas Supreme Court's contemporaneous consideration of an unsettled state-law issue where the State itself was a party. The petition requested that the Court, at minimum, grant a "GVR" order directing the Eighth Circuit to give further consideration to the intervening Kansas Supreme Court decision. This latter request drew the support of three Members of this Court (O'Connor, Souter and Ginsburg, JJ.), as indicated in the Court's order denying certiorari entered on January 12, 1998. 522 U.S. 1068.

6. The Instant Motion for Rule 60(b) Relief

Two and half months after this Court's denial of certiorari, the Eighth Circuit decided another appeal in this case brought by KPERS from the district court's grant of summary judgment in favor of a final defendant in the case, Michael K. Russell. The Eighth Circuit ruled for KPERS in this appeal, *see KPERS v. Michael K. Russell*, 140 F.3d 748, 752 (8th Cir. 1998) ("*KPERS*

VII"). It did so by applying the Kansas Supreme Court decision that had come down seven days after the Eighth Circuit's mandate issued in *KPERS VII*, a decision which it concluded it was "obliged to follow." Pet. App. 4a. With the entry of this Eighth Circuit decision, it was clear that the accident of a week's timing had resulted in a radically different outcome for the co-defendants in the case, who had all been sued in connection with KPERS' investment in Home Savings: the claim against Russell had been held timely, whereas the claims against all the other defendants had been held time-barred.

To exhaust every other option for obtaining relief to ensure a consistent result on the claims against all the defendants, on April 20, 1998, KPERS filed with this Court a motion for leave to file out of time a petition for rehearing of the Court's denial of certiorari, to which it attached the petition itself. The motion and petition invoked past decisions of this Court allowing rehearing out of time in those admittedly rare instances where the timing of this Court's certiorari process has lead to opposite results among litigants involved in the very same case. *E.g.*, *Gondeck v. Pan American World Airways*, 382 U.S. 25, 27 (1962) (per curiam); *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957) (per curiam); *Cahill v. New York, N.H. & H.R.R. Co.*, 351 U.S. 183, 184 (1956). On May 18, 1998, the Court denied leave to file. 118 S. Ct. 1834-35.

Three days later, pursuant to Fed. R. Civ. P. 60(b)(6), KPERS moved in the district court for relief from the judgment. It invoked a line of federal appellate cases authorizing Rule 60(b) relief upon a change in controlling state law where relief is needed to eliminate a disparity in the outcome of related cases, especially where that disparity is the result of the judgment loser having been deprived of its initial choice of a state-court forum that would have permitted an authoritative resolution of the issue, so that *Erie* principles cut in favor of relief on such facts. *See* Pet. App. at 4a-5a, 9a.

Opposing the motion, respondents advanced, as an equitable consideration warranting the denial of relief, the fact that following their engineering of the removal of this case to Missouri federal court in 1992, KPERS had devoted years of energetic litigation activity, covering multiple appeals and petitions for certiorari,

advancing various grounds opposing the exercise of jurisdiction over this case by the federal courts. The district court accepted this basis for denying relief, opining that "passing familiarity" with KPERS' past litigation efforts "would convince any fair-minded person" that "KPERS long ago abandoned any persuasive claim to equity." App. 11a (citing *In re KPERS*, 85 F.3d 1353, 1359-60 (8th Cir. 1996); *KPERS IV*, 77 F.3d at 1066).

On appeal, respondents defended the district court's denial of Rule 60(b) relief on the theory that, by virtue of KPERS' past efforts to return the case to Kansas state court, or at least to obtain a definitive statute-of-limitations ruling by pursuing parallel litigation there, KPERS had "unclean hands" disabling it from obtaining relief. See note 10, *infra*. The Eighth Circuit did not dispute KPERS' showing that existing federal appellate precedent, applied in light of five extraordinary factors present in this case, required granting the relief requested. Pet. App. at 5a (listing factors and summarizing applicable precedent).[9]

Instead, the Eighth Circuit affirmed the district court on respondents' "unclean hands" theory, based on "KPERS' course of conduct during this litigation." Pet. App. 5a. One of the "equitable considerations" supporting the denial of relief, the Eighth Circuit explicitly held, was the fact that KPERS had "filed parallel state court actions" as a means of obtaining an authoritative statute-of-limitations ruling from the Kansas Supreme Court. Pet. App. 6a (citations omitted). Thus, KPERS' past efforts to head off an error on this threshold Kansas state-law issue, and hence any *need* to bring a Rule 60(b) motion, were in the end cited against it as imposing a *bar* to Rule 60(b) relief.

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[9] The Eighth Circuit's assumption that Rule 60(b)(6) is a permissible procedural vehicle for awarding such relief, depending on the particular circumstances, is in accord with this Court's decisions. *See Agostini v. Felton*, 117 S. Ct. 1997, 2018 (1997) (noting that "[i]ntervening developments in the law *by themselves* rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)") (citing J. Moore, 12 Moore's Federal Practice, § 60.48[5][b], ¶ 60-181 (3d ed. 1997)) (emphasis added). *See also Polites v. United States*, 364 U.S. 426, 433 (1960) (declining to hold that "relief under Rule 60(b) is inflexibly to be withheld when there has later been a clear and authoritative change in governing law").

REASONS FOR GRANTING THE WRIT

Review is warranted in this case to correct the Eighth Circuit's fundamental misunderstanding of the "equitable" balancing required of federal courts under Fed. R. Civ. P. 60(b), and to thereby provide the lower federal courts with guidance in this area. Review is particularly needed here because KPERS is not a private litigant but an agency of the State of Kansas. In this case, the Eighth Circuit applied its theory of Rule 60(b) equitable balancing to hold that a sovereign State is to be regarded as having "unclean hands," disabling it from obtaining Rule 60(b) relief to which it would otherwise be entitled, because it earlier asserted its sovereign interest in having its own claims arising under its own law decided by its own courts. The Eighth Circuit's decision violates basic principles of federalism, conflicts with numerous decisions of this Court and of other federal circuit courts, and warrants plenary review.

1. The Eighth Circuit's decision is in conflict with decisions of this Court and the lower federal appellate courts indicating that the "equitable" balancing requirement governing Rule 60(b)(6) determinations hinges on a weighing of the general concern for finality against the specific concern for a correct outcome in the case at hand. In its first decision interpreting Rule 60(b)(6), this Court emphasized that the rule was adopted to ensure "that courts no longer are to be hemmed in by the uncertain boundaries" of prior common-law writs under which relief from a final judgment could be obtained; instead, Rule 60(b)(6) vests in them power "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949). *See also id.* at 609. This Court reaffirmed this construction of Rule 60(b) in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1987), while also reiterating that the rule "should only be applied in 'extraordinary circumstances.'" *Id.* at 863-64 (citing *Ackermann v. United States*, 340 U.S. 193 (1950)).

In implementing Rule 60(b)(6), the federal circuit courts of appeal have required a focus on the balancing of two basic factors:

the general interest in *finality* of judgments, and the specific interest in *justice* in achieving a correct outcome in the particular case at hand. *See, e.g.*, *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1144 (2d Cir.), *cert. denied*, 513 U.S. 1007 (1994); *First Fidelity Bank, N.A. v. Government of Antigua*, 877 F.2d 189, 196 (2d Cir. 1989); *Twelve John Does v. District of* Columbia, 841 F.2d 1133, 1138-41 (D.C. Cir. 1988); *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320-22 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988); *Nemaizer v. Baker*, 793 F.2d 58, 61-64 (2d Cir. 1986); *Great Coastal Express, Inc. v. International Bhd. of Teamsters, etc.*, 675 F.2d 1349, 1354-55 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128 (1983); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401-02 (5th Cir. 1981).

The decision of the court of appeals below cannot be squared with this body of precedent. In affirming the district court's denial of Rule 60(b)(6) relief, the Eighth Circuit did not confine itself to a balancing of the interest in finality against the interest on these facts in an outcome under which *all* the defendants sued by KPERS are treated equally with respect to the statute-of-limitations issue. The Eighth Circuit did not dispute that the five key factors cited by KPERS bearing on the "finality versus justice" balancing would ordinarily require a grant of Rule 60(b)(6) relief. *See* Pet. App. at 5a. Instead, the Eighth Circuit elected to affirm based on respondents' "unclean hands" theory of Rule 60(b). *See id* at 5a-6a. Under this theory, KPERS must be denied Rule 60(b)(6) relief from the Eighth Circuit's erroneous statute-of-limitations ruling under Kansas law as to all but one defendant, whatever the outcome of this balancing, because KPERS deserves to be penalized for *earlier* seeking to have this litigation, or at least the statute-of-limitations issue, resolved in the Kansas state courts.[10]

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[10] For example, one set of respondents in its Eighth Circuit brief below characterized these efforts by an agency of the State of Kansas to litigate its own claims arising under its own law in its own courts, and to overcome the manipulative motion practice by respondents that had resulted in the case's removal to federal court, as "an assault upon the federal court system." Brief of Appellees Reimer & Koger Associates, Inc., et al., at 4. A particular vice of KPERS' efforts, these respondents claimed — oblivious to basic *Erie* principles

Quite apart from the obvious error underlying this holding — for a sovereign State to seek to litigate important governmental issues in its own courts can hardly make it guilty of "unclean hands," see pp. 21-23, *infra* — the Eighth Circuit has impermissibly engrafted upon Rule 60(b) an inquiry that finds no textual support and that is wholly at odds with the decisions of other circuits and of this Court.

2. Civil plaintiffs, including KPERS, are generally accorded the choice of forum. Where defendants, through manipulative motion practice (as here) or otherwise seek to shift the litigation to another forum, plaintiffs have every right to resist such efforts. Where those efforts fail, and the litigation is removed from state to federal court, civil plaintiffs who are concerned that the federal court will incorrectly decide critical issues of state law have every right to seek an authoritative state-court ruling, either by requesting certification (as here), seeking to litigate a parallel state-court lawsuit (as here), or asking the federal court to await an impeding decision by an authoritative court that will resolve the disputed issue (as here).

Civil plaintiffs such as KPERS that are stripped of their forum choice and find themselves in federal court should not be penalized on account of such efforts if they later file a Rule 60(b)(6) motion. As long as they file meritorious papers (and if they do not, they may be appropriately sanctioned under applicable sanctions rules), civil plaintiffs have a right to use available litigation options to defend their forum choice and to seek authoritative rulings on state-law issues, and they also have a right to seek relief that might later

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— was KPERS' "attempt to obtain a contrary statute of limitations ruling by the Kansas courts." *Id. See also* Brief of Appellees Estate of Frank Morgan, et al., at 8 (urging the denial of Rule 60(b)(6) relief based on the "continual flouting of federal jurisdiction by KPERS"); Brief of Appellee Blackwell Sanders Peper Martin LLP at 10-11 (arguing that relief should be "rejected out of hand" because of KPERS' "shenanigans"); Brief of Defendants-Appellees KPMG Peat Marwick LLP and Robert W.L. Spence at 20 (defending district court's view that "granting KPERS Rule 60(b)(6) relief would inappropriately reward KPERS' abusive and manipulative litigation strategies").

be warranted under Rule 60(b)(6). *Cf. Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (observing that litigation "is an aspect of the First Amendment right to petition the Government for redress of grievances"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982) (holding that a plaintiff has a property interest in an accrued cause of action).

The Eighth Circuit's theory of Rule 60(b)(6) penalizes civil plaintiffs for asserting legitimate arguments against the exercise of federal court jurisdiction at the outset of the case, by denying them Rule 60(b)(6) relief to which they are otherwise entitled at the end of the case. This Court should not permit an interpretation of Rule 60(b)(6) that effectively forces civil plaintiffs to choose between advancing their position early in the case versus receiving relief to which they may be entitled at the end of the case. *Cf. Simmons v. United States*, 390 U.S. 377, 393-94 (1968) (articulating in criminal litigation context a general rule against requiring the surrender of one right to advance another).

Worse, applied in a case such as this, the Eighth Circuit's approach imposes a "Catch-22" on litigants such as KPERS. To qualify for relief under Rule 60(b)(6), KPERS must show that prior to seeking such relief it worked diligently to prevent the entry of the erroneous judgment in the case. *See, e.g.*, 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2864, at 359 (1995). Given its zealous efforts to return the case to the Kansas state courts, or at least obtain an authoritative statute-of-limitations ruling from the Kansas Supreme Court, it is clear that KPERS met this requirement, so as to *qualify* for Rule 60(b)(6) relief. See pp. 4-14, *supra*. But under the Eighth Circuit's theory, these very actions by KPERS to protect its own interests now perversely operate to *bar* KPERS from obtaining Rule 60(b)(6) relief, on an "unclean hands" theory that its efforts to avoid state-law error in the federal courts flouted the jurisdiction of the federal courts. See note 10, *supra*. The "Catch-22" concept, one of the more vivid literary devices of the twentieth century, has been cited in hundreds of briefs before this Court, but rarely as aptly as in this case in describing the theory of respondents and the Eighth Circuit. *Compare* JOSEPH HELLER, CATCH-22 (1955) (Scribner ed. 1996), at 55, 124.

3. Review is all the more urgently warranted in this case because KPERS is no ordinary litigant. KPERS is an agency of the State of Kansas, carrying out governmental functions of the State. KPERS' vigorous efforts to return this case to the Kansas state courts from whence it came, after the predicate for its removal was gone, were in defense of the prerogative of a sovereign State to bring its own civil claims arising under its own law in its own courts, against defendants who had earlier contracted with the State and thus were on notice that this would be the forum in which they would face the State if accused of wrongdoing in civil litigation.

It bears emphasis here that respondents were not satisfied with engineering the removal of this case to Missouri federal court by bringing meritless claims against a third-party defendant that would predictably remove the case prior to winning its dismissal from the case. See note 4, *supra*. Here, after KPERS' efforts to have the threshold statute-of-limitations issue certified to the Kansas Supreme Court were rejected, prompting KPERS to file parallel litigation in the Kansas state courts through which to set up the issue for authoritative appellate review, respondents persuaded the district court to enjoin these suits. See pp. 7-8, *supra*. The district court thereby obtained a jurisdictional monopoly over a type of litigation — civil fraud claims and other civil claims brought solely under state law and pursued by Kansas in its sovereign capacity in lieu of a criminal prosecution — that Congress has never defined as part of the original or the removal jurisdiction of the federal courts, and that has long been protected as the exclusive province of the States.

Astonishingly, on this record the Eighth Circuit below held that the efforts of the State of Kansas, through its agency, KPERS, to overcome this federal judicial inteference with its sovereign functions amounted to "unclean hands" permitting the denial of Rule 60(b)(6) relief to which KPERS would otherwise be entitled. This cannot be the law. It cannot constitute "unclean hands" for a sovereign State to advance its interest in seeing disputes to which it is a party resolved in its own courts. For example, when the federal constitutional rights of a State's litigation opponents are at stake in criminal litigation or other litigation of importance to the

State, the State is entitled to insist that its opponents litigate their federal constitutional claims in state court. *E.g., Younger v. Harris*, 401 U.S. 37 (1971); *Trainor v. Hernandez*, 431 U.S. 434, 444-47 (1977). Thus, had the State of Kansas, in the aftermath of its $65 million loss on its Home Savings investment, brought a criminal prosecution against some of the respondents for fraud, rather than limiting itself to a civil suit, respondents could not have enjoined those proceedings.

This Court has likewise accorded States broad latitude to insist on conducting *civil* litigation in its own courts as opposed to federal court, even when it is a *defendant* being sued for damages by a private party under federal law. In such circumstances, a State may of course invoke the Eleventh Amendment as a bar to being sued in federal court. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). And as this Court held last Term, a State also enjoys the prerogative of claiming sovereign immunity against suit in its own courts. *Alden v. Maine*, 119 S. Ct. 2240 (1999). *See also College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999).

The Eighth Circuit's decision below, holding that the State of Kansas had "unclean hands" on account of having sought to litigate its own state-law claims in its own courts, flies in the face of the principles of federalism recognized in these decisions. Had respondents been the ones suing KPERS, for money damages allegedly owed under a federal statute in conjunction with KPERS' governmental functions, KPERS would have had the prerogative to deny respondents *any* forum in which to litigate those federal statutory claims. Here, KPERS sought only to litigate its own Kansas law claims against respondents in the forum of its choice, in which respondents would have had a full and fair opportunity to defend. For the State of Kansas to thereby seek to advance its sovereign interests in its own courts is not something that should later be used against the State to deprive it of relief to which it would otherwise be entitled under Rule 60(b)(6), or under any other rule.

In its decision below, the Eighth Circuit employed an unprecedented approach to Rule 60(b)(6) to penalize an agency of the State of Kansas, acting in its governmental capacity, for pursuing its sovereign interest in adjudicating its own claims arising under its own law in its own courts, or at least to have the threshold statute-of-limitations issue resolved authoritatively in the Kansas Supreme Court. It denied KPERS relief to which it would otherwise be entitled, leaving in place a dismissal of KPERS' claims against some of the defendants in this case, while its claims against a final defendant go forward.

The explicit basis of the Eighth Circuit's ruling is that the State of Kansas has "unclean hands" on account of its zealous defense, throughout this litigation, of its sovereign interests. Adopting the view that KPERS' federalism arguments against the jurisdictional monopoly seized by the federal courts below were "objectively unreasonable" and made "in bad faith," the Eighth Circuit has evidently joined the camp of those who believe that "[a]rguments about federalism values" are "little more than the last refuge of a scoundrel." DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 7 & n.25 (1995). The Eighth Circuit's decision is an affront to fundamental principles of federalism and should not be left in place.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 3, 2000

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APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 98-3528

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff—Appellant,

v.

REIMER & KOGER ASSOCIATES, INC., a Kansas Corporation; RONALD REIMER, an individual; KENNETH H. KOGER, an individual; CLIFFORD W. SHINSKI, an individual; BRENT MESSICK, an individual; ROBERT CREW, an individual; SHERMAN DREISESZUN, an individual; I.I. OZAR, an individual; FRANK SEBREE, and individual; MICHAEL K. RUSSELL, an individual; GAGE & TUCKER, a law partnership; PEAT, MARWICK, MITCHELL & CO., an accountancy firm; KPMG PEAT MARWICK, an accountancy firm; ROBERT SPENCE, an individual; THOMAS S. MORGAN, co-executor of the estate of FRANK S. MORGAN; MARILYN J., co-executor of the estate of FRANK S. MORGAN,
Defendants-Appellees,

C. PATRICK McLARNEY, substituted for SHOOK, HARDY & BACON,
Intervenor-Defendant-Appellee.

BLACKWELL, SANDERS, PEPER, MARTIN, L.L.P.; WILLIAM H. SANDERS, SR., individually and as the representative of a defendant class,
Intervenor-Defendants—Appellees.

October 5, 1999

Before McMILLIAN, BOWMAN, and JOHN R. GIBSON, Circuit Judges.

Kansas Public Employees Retirement System appeals the district court's[1] denial of its motion for relief from final judgment under Fed. R. Civ. P. 60(b). In the underlying case, summary judgment was entered against KPERS in favor of all the defendants in this case (except Michael Russell) on the ground that KPERS's claims were barred by the applicable Kansas statutes of limitations. *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi*, 114 F.3d 679 (8th Cir. 1997)(*KPERS VI*), *cert. denied*, 522 U.S. 1068, 118 S. Ct. 738, 139 L. Ed. 2d 675 (1998), leave to file for *rehearing denied*, 140 L. Ed. 2d 968, 118 S. Ct. 1834 (1998). Shortly after our decision in *KPERS VI* affirming the summary judgment, the Kansas Supreme Court decided *KPERS v. Reimer & Koger Assoc., Inc.*, 941 P.2d 1321, 1343 (Kan. 1997), disapproving of our interpretations of Kansas law that led to the summary judgment against KPERS. KPERS received the benefit of this change in state law in *KPERS v. Russell*, 140 F.3d 748 (8th Cir. 1998) (*KPERS VII*), which held that Michael Russell was not entitled to summary judgment under the statute of limitations defense. KPERS moved to reopen the case under Rule 60(b) in light of the change in Kansas law. The district court denied KPERS's motion and we affirm.

KPERS initially filed this action in state court in Kansas against its investment advisors to recoup KPERS's investment of some $65 million in debentures of Home Savings Association, a thrift that failed. When KPERS joined as defendants certain former directors of Home Savings, the directors impleaded the Resolution Trust Corporation, receiver of Home Savings. Acting under 12 U.S.C. § 1441a(*l*)(3), the RTC removed the case to the Western District of Missouri, which resulted in the application of Missouri, rather than Kansas, limitations law. *KPERS v. Reimer & Koger, Inc.*, 61 F.3d 608, 614 (8th Cir. 1995) (*KPERS III*), *cert. denied*, 516 U.S. 1114 (1996). Under Missouri's borrowing statute, the

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[1] The Honorable D. Brook Bartlett, Chief Judge for the United States District Court for the Western District of Missouri.

Kansas statute of limitations would apply if it were shorter than the five-year Missouri statute. Id. We concluded that under Kansas law the Kansas ten-year statute for actions by KPERS would not apply retroactively to revive a barred claim. *Id.* at 615. In *KPERS VI* we rejected the argument that KPERS's investment activities were a governmental function so that claims based on those activities were not subject to a statute of limitations, and we decided that the Kansas two-and three-year statutes of limitations barred KPERS's claims. 114 F.3d at 687-88.

While *KPERS VI* was under submission, the Kansas courts were entertaining an appeal by KPERS in another case, concerning which, if any, Kansas statute of limitations applied to claims arising out of KPERS's investments. KPERS asked this Court to certify the statute of limitations question to the Kansas Supreme Court, *see KPERS VI*, 114 F.3d at 688 n.11, but we declined to do so and we issued our *KPERS VI* opinion on May 13, 1997. We denied rehearing on June 12, 1997, and our mandate issued on June 20, 1997.

A week after our mandate issued, on June 27, 1997, the Kansas Supreme Court decided its KPERS case, holding that, contrary to our rulings, KPERS's investment activities were governmental in nature, and therefore no statute of limitations applied to them until the Kansas ten-year statute was enacted. 941 P.2d at 1343.

On July 17, 1997, KPERS filed a motion in this Court for leave to file a second rehearing petition in *KPERS VI* or, in the alternative, for us to recall our mandate in light of the Kansas decision. We denied the motion. On September 10, 1997, KPERS filed a petition for a writ of certiorari, arguing that the case should be remanded in light of the Kansas decision. The Supreme Court denied certiorari on January 12, 1998. *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi*, 522 U.S. 1068, 118 S. Ct. 738, 139 L. Ed. 2d 675 (1998).

In the meantime, the one remaining defendant in this case, Michael Russell, who was unrepresented by counsel, obtained summary judgment in the district court on the ground that KPERS's claim was time-barred. KPERS appealed that judgment, and we decided the appeal after the Kansas decision. Russell filed

no brief in the appeal. Because we were obliged to follow Kansas law on the statute of limitations issue, we reversed the judgment in favor of Russell in light of the new Kansas decision. *KPERS VII*, 140 F.3d at 751. We held that under the new decision the Kansas ten-year statute was the only statute of limitation applicable to KPERS's claim, and that the claim was therefore timely filed. *Id.* at 752.

Our decision in *KPERS VII* was filed on March 30, 1998. On May 21, 1998, KPERS filed the Rule 60(b) motion for relief from judgment at issue in this appeal. The district court denied the motion on two independent grounds: first, that KPERS had already presented the change in law argument to this Court on its motion for leave to file a second rehearing petition or to recall mandate, and we had denied the motion; and second, that KPERS had not presented exceptional circumstances warranting Rule 60(b)(6) relief.

We review the district court's Rule 60(b) rulings only for abuse of discretion. *Carter v. Romines*, 593 F.2d 823, 824 (8th Cir. 1979). Rule 60(b)(6) authorizes relief from final judgments in extraordinary circumstances. *Cornell v. Nix*, 119 F.3d 1329, 1332-33 (8th Cir. 1997). Generally, a change in the law that would have governed the dispute, had the dispute not already been decided, is not by itself an extraordinary circumstance. *See, e.g.*, *Carter*, 593 F.2d at 824; *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628 (7th Cir. 1997); *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748 (5th Cir. 1995), *cert. denied*, 517 U.S. 1221, 134 L. Ed. 2d 951, 116 S. Ct. 1851 (1996); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272-74 (2d Cir.), *cert. denied*, 513 U.S. 1001, 130 L. Ed. 2d 419, 115 S. Ct. 512 (1994); *Dowell v. State Farm Fire & Cas. Auto Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993). Society's powerful countervailing interest in the finality of judgments simply requires that each case have an end, though the law continues to evolve. "[The common law could not safely develop if the latest evolution in doctrine became the standard for measuring previously resolved claims." *Biggins v. Hazen Paper Co.*, 111 F.3d 205, 212 (1st Cir.), *cert. denied*, 522 U.S. 952, 118 S. Ct. 373, 139 L. Ed. 2d

290 (1997). Moreover, there is nothing in the Erie[2] doctrine that requires federal courts to sacrifice the finality of their judgments because state courts subsequently interpret state law differently than the federal courts have done. *DeWeerth*, 38 F.3d at 1272-74; *Batts*, 66 F.3d at 749-50; *Cincinnati Ins. Co.*, 131 F.3d at 628-29. Therefore, even though the law has changed since judgment was entered against KPERS, KPERS must show some extraordinary circumstance in order to justify Rule 60(b) relief.

KPERS argues that several factors make this an extraordinary case. First, after *KPERS VII*, different rules of law will govern the same issue in the same case involving the same factual setting. *See Pierce v. Cook & Co.*, 518 F.2d 720, 723 (10th Cir. 1975) (en banc), *cert. denied*, 423 U.S. 1079, 47 L. Ed. 2d 89, 96 S. Ct. 866 (1976); *McGeshick v. Choucair*, 72 F.3d 62, 64-65 (7th Cir. 1995), *cert. denied*, 517 U.S. 1212, 134 L. Ed. 2d 937, 116 S. Ct. 1834 (1996). Second, KPERS did not choose to litigate in federal court with the attendant possibility of a misinterpretation of state law, but landed in federal court as a result of removal by a third party defendant. *See Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 90 (2d Cir. 1996) (recalling mandate of Court of Appeals). Third, before judgment was entered in this case, KPERS alerted the federal courts to the pendency of the issue in the Kansas courts and asked for certification of the question. *See Sargent*, 75 F.3d at 90. Fourth and fifth, the disposition of KPERS's case was not on the merits, and KPERS contends that the defendants would suffer no unfair prejudice from reopening the case. *See MIF Realty L.P. v. Rochester Assocs.*, 92 F.3d 752, 755-56 (8th Cir. 1996).

While these factors have been considered relevant in other cases, they do not compel the conclusion that the district court abused its discretion in denying KPERS's motion. The district court alluded to KPERS's course of conduct during this litigation, stating: "Only passing familiarity with the history of this case in this court and in the appellate courts would convince any fair-minded person that the time has come for this court to echo the

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[2] *Erie RR. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).

Eighth Circuit Court of Appeals — this case is over." Early in this case, KPERS obtained an ex parte severance from the Kansas state court in order to frustrate removal. *KPERS v. Reimer & Koger Assoc., Inc.*, 4 F.3d 614 (8th Cir. 1993) (*KPERS I*), *cert. denied*, 511 U.S. 1126, 128 L. Ed. 2d 862, 114 S. Ct. 2132 (1994). KPERS later filed parallel state court actions which were meant to subvert federal removal jurisdiction, *KPERS v. Reimer & Koger Assoc., Inc.*, 77 F.3d 1063, 1070 (8th Cir. 1996) (*KPERS IV*), *cert. denied*, 519 U.S. 948, 136 L. Ed. 2d 250, 117 S. Ct. 359 (1996). The district court held the filing of those cases to be objectively unreasonable and done in bad faith, and we affirmed. *See KPERS v. Reimer & Koger Assoc., Inc.*, 165 F.3d 627, 629 (8th Cir. 1999) (*KPERS VIII*) (affirming award of attorney fees against KPERS for unreasonably and vexatiously multiplying proceedings). The district court may properly give weight to equitable considerations in exercising its discretion under Rule 60(b). *MIF Realty*, 92 F.3d at 755-56. Here, the district court did so and declined to reopen this case. We see no abuse of discretion in the district court's ruling.[3]

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[3] The discretion vested in the district court in ruling on Rule 60(b) motions distinguishes this case from *Brenna v. Fed'l Cartridge Co.*, 183 F.2d 414 (8th Cir. 1950) (per curiam), in which this Court granted rehearing of one of its own decisions based on a change in the law.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,	)	No. 92-0922-CV-W-9
Plaintiff,	)	No. 92-0819-CV-W-9
v.	)	
MICHAEL RUSSELL,	)	Filed Aug. 19, 1998
Defendant.	)	

ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(6), FEDERAL RULES OF CIVIL PROCEDURE

I.
BACKGROUND

On June 3 and July 25, 1996, I entered orders granting summary judgment in favor of all defendants, except Michael Russell, in this case. KPERS appealed.

Defendant Russell, representing himself, subsequently moved for summary judgment. On March 4, 1997, I entered an order granting Russell's motion. KPERS appealed the March 4, 1997, order. Russell did not participate in the appeal and did not file a brief in the Eighth Circuit Court of Appeals supporting his position.

On May 13, 1997, the Eighth Circuit Court of Appeals affirmed the June 3, and July 25, 1996, orders granting summary judgment to all defendants except Russell. *See KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, 114 F. 3d

679 (8th Cir. 1998) (*KPERS VI*). The Eighth Circuit Court of Appeals denied KPERS' motions for rehearing and rehearing en banc on June 12, 1997. The Eighth Circuit Court of Appeals issued its mandate on June 20, 1997.

On June 27, 1997, the Kansas Supreme Court entered an order interpreting Kansas law applicable to KPERS. *KPERS v. Reimer & Koger Assoc., Inc.*, 262 Kan. 635, 941 P.2d 1321 (1997). Specifically, the Kansas Supreme Court disagreed with the Eighth Circuit Court of Appeals' prior rulings and held that claims by KPERS are not governed by the general two and three year statute of limitations. *Id.*

KPERS did not file any motion in this court seeking relief based on the Kansas Supreme Court's June 27, 1997, decision.

On or about July 17, 1997, in *KPERS VI*, KPERS filed with the Eighth Circuit Court of Appeals a Motion for Leave to File Instanter a Second Petition for Rehearing Out of Time or, Alternatively, to Recall Mandate for the purpose of Conforming Decision to Recent Controlling Decision of State Law. KPERS argued that the decision of the Kansas Supreme Court should control the statute of limitations issues in *KPERS VI*. On January 12, 1998, the United States Supreme Court denied certiorari. *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, ___ U.S. ___, 118 S. Ct. 738 (1998).

KPERS' appeal of my order granting summary judgment to Russell was pending at the time of the Kansas Supreme Court's June 27, 1997, order. On March 30, 1998, the Eighth Circuit Court of Appeals reversed the March 4, 1997, order granting summary judgment to defendant Russell on the ground that there had been an intervening change in state law. *KPERS v. Russell*, 140 F.3d 748 (8th Cir. 1998) (*KPERS VII*).

The Eighth Circuit Court of Appeals in *KPERS VII* declined to follow the holding in KPERS VI because the Kansas Supreme Court's decision was handed down after *KPERS VI* but before the decision in *KPERS VII*. *Id.* at 751. The Eighth Circuit Court of Appeals stated that "*KPERS VI* became final" when the United States Supreme Court denied certiorari on January 12, 1998. *Id.*

On April 20, 1998, KPERS filed with the United States Supreme Court a Motion for Leave to file Petition for Rehearing Out of Time, and Petition for Rehearing. Based on the Eighth Circuit Court of Appeals' *KPERS VII* decision, KPERS asked the Supreme Court to vacate the January 12, 1998, denial of certiorari in *KPERS VI*. KPERS presented the same arguments to the Supreme Court that are presently before this Court. On May 18, 1998, the Supreme Court denied KPERS' motion.

On May 21, 1998, KPERS filed in this court a Rule 60 (b) (6) Motion for Relief from Judgment. Based on the Eighth Circuit Court of Appeals' decision in *KPERS VII*, KPERS seeks relief from the 1996 orders involved in *KPERS VI* granting summary judgment to all defendants except Russell. *See* Reply Memorandum, pp. 6-7 ("it is not the Kansas Supreme Court's ruling alone that warrants Rule 60(b) relief in this case, it is the 8th Circuit's ruling in *KPERS VII*").

II.
DISCUSSION

A. Rule 60 (b) Does Not Authorize this Court to Review Appellate Court Decisions Rejecting the Basis of KPERS' Argument for Rule 60 (b) Relief

Rule 60 (b) does not give a court the power to revisit an issue already decided by an appellate court. *See, e.g., Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 (8th Cir. 1990); *Colorado Interstate Gas v. Natural Gas Pipeline*, 962 F.2d 1528, 1534 (10th Cir. 1992) ("district court must comply strictly with the mandate rendered by the reviewing court.").

KPERS argues that it is not asking for relief based on the Kansas Supreme Court decision but on the reasoning of the Eighth Circuit Court of Appeals in *KPERS VII*. However, KPERS wraps the package, the foundation of KPERS' argument here, and in KPERS VII and in its July 17, 1997, Motion for Leave to File a Second Petition for Rehearing in *KPERS VI*, is that the decision of the Kansas Supreme Court, not the decision of the Eighth Circuit

Court of Appeals, establishes the applicable statute of limitations. When presented with KPERS' argument, the Eighth Circuit Court of Appeals refused to grant a rehearing or to recall its mandate in KPERS VI. Thereafter, when presented with the same argument, the United States Supreme Court denied certiorari.

Under these circumstances, Rule 60(b) does not authorize this court to grant relief from the final judgment in *KPERS VI.*

B. KPERS is Not Entitled to Relief Under Rule 60(b)

Even if one accepts KPERS' argument that it has already presented to appellate courts the argument made here, KPERS is not entitled to relief under Rule 60 (b). The reasoning of the Eighth Circuit Court of Appeals in *KPERS VII* cannot possibly produce the same result in *KPERS VI* because the procedural facts in *KPERS VI* are crucially different from the procedural facts in KPERS VI are crucially different from the procedural facts in *KPERS VII. KPERS VI* was finally decided by the Eighth Circuit Court of Appeals *before* the Kansas Supreme Court decision. The crucial factual difference that led the Eighth Circuit Court of Appeals to reach a result in *KPERS VII* that was different from the result in *KPERS VI* was that the Eighth Circuit Court of Appeals decided *KPERS VII* after the Kansas Supreme Court decision was issued. Therefore, applying the reasoning of KPERS VII to the facts in *KPERS VI* would produce a different result in *KPERS VI* than was reached in *KPERS VII.*

Furthermore, Rule 60 (b) provides the relief "only where the movant has shown exceptional circumstances." *Hepper v. Adams County*, 133 F.3d 1094, 1096 (8th Cir. 1998). For the reasons state in ¶ 4-9 of defendant KMPG Peat Marwick and Robert W. L. Spence's Memorandum of Law, a change in or clarification of state law after a final decision in federal court is not an exceptional circumstance allowing the extraordinary relief of reopening the final *KPERS VI* judgment. Therefore, plaintiff has not satisfied its burden under Rule 60 (b) (6).

III.
CONCLUSION

Only passing familiarity with the history of this case in this court and in the appellate courts would convince any fair-minded person that the time has come for this court to echo the Eighth Circuit Court of Appeals — this case is over. To the extent, if at all that equitable considerations have an effect on Rule 60 (b) relief, KPERS long ago abandoned any persuasive claim to equity. *See In re KPERS*, 85 F.3d 1353, 1359-60 (8th Cir. 1996); *KPERS v. Reimer & Koger Assoc. Inc.*, 77 F. 3d 1063, 1066 (8th Cir.), *cert. denied*, 117 S. Ct. 345 (1994).

Because this court is without power to grant relief when higher courts have refused to grant relief when presented with the very reasons advanced here and because plaintiff has not demonstrated exceptional circumstances justifying extraordinary relief, KPERS' Rule 60 (b) (6) Motion for Relief from Judgment is denied.

/s/
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri

August 19, 1998

Supreme Court, U.S.
FILED
FEB 03 2000
CLERK

No. 99-1125

IN THE
SUPREME COURT OF THE UNITED STATES

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, INC.
Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT SHOOK, HARDY & BACON

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February 3, 2000 **Counsel of Record*

QUESTION PRESENTED

Whether the Court should grant review of the court of appeals' affirmance of the district court's denial of relief from final judgment under Fed. R. Civ. P. 60(b)(6) where (1) the district court considered as an equitable ground for denying relief the movant's history of bad faith litigation tactics intended to delay the ultimate resolution of the case, and (2) neither the district court nor the court of appeals found that there were extraordinary circumstances that would justify Rule 60(b) relief.

LIST OF PARTIES AND AFFILIATES

The following parties are respondents: Reimer & Koger Associates, Inc., Ronald Reimer; Kenneth H. Koger; Clifford W. Shinski; Brent Messick; Robert Crew; Sherman Dreiseszun; I.I. Ozar; Frank Sebree; Gage & Tucker; Peat, Marwick, Mitchell & Co.; KPMG Peat Marwick LLP; Robert W. Spence; Thomas S. Morgan and Marilyn J. Morgan, co-executors of the estate of Frank S. Morgan; Shook, Hardy & Bacon, through C. Patrick McLarney acting as a representative of the class of all partners in Shook, Hardy & Bacon; Shook, Hardy & Bacon P.C.; Blackwell, Sanders, Peper, Martin, L.L.P.; and William H. Sanders, Sr.

In addition, Michael Russell was a defendant in the district court, and the Resolution Trust Corporation was a third-party defendant in the district court, as well as a limited intervenor in that court.

Pursuant to Rule 29.6, respondent Shook, Hardy & Bacon has no parent companies or subsidiaries. Shook, Hardy & Bacon L.L.P. is the successor to Shook, Hardy & Bacon. Shook, Hardy & Bacon L.L.P. owns SHB Registered Agent, Inc., a Missouri corporation, and SHB Kansas Registered Agent, Inc., a Kansas Corporation. Certain partners in Shook, Hardy & Bacon L.L.P. are also partners in Shook, Hardy & Bacon, a multinational partnership.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, INC.,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC. ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT SHOOK, HARDY & BACON

COUNTERSTATEMENT OF THE CASE

The petition of Kansas Public Employees Retirement System, Inc. (KPERS) raises no issue worthy of review. The arguments advanced by KPERS rest on an incorrect reading of the Eighth Circuit's decision. The Eighth Circuit did not adopt a new inquiry under Fed. R. Civ. P. 60(b) that conflicts with the text of the Rule or with federal precedent, or, indeed, any "new inquiry" at all. Rather, the decision reflects nothing more than the routine application of the abuse of discretion standard of appellate review to the district court's fact-bound equitable balancing under Rule 60(b)(6).

1. Procedural History

KPERS' statement of the case is both incomplete and inaccurate. The nine-year history of this case undermines, rather than supports, KPERS' petition.

a. The Parties and the Claims Asserted

In 1991, KPERS filed suit in Kansas state court against the former directors of Home Savings Association, F.A. of Kansas City, Missouri ("Home Savings") and others seeking damages for losses on investments it made in Home Savings in 1986. KPERS' claims are "conventional" common law or statutory tort claims seeking money damages only. *See KPERS v. Reimer & Koger Assocs., Inc. ("KPERS II")*, 60 F.3d 1304, 1306 (8th Cir. 1995); *KPERS v. Reimer & Koger Assocs., Inc. ("KPERS IV")*, 77 F.3d 1063, 1071 (8th Cir.), *cert. denied*, 519 U.S. 948 (1996). They are being pursued by private counsel under a contingency fee agreement with KPERS.

On March 17, 1992, the Home Savings director defendants moved to dismiss KPERS' claims in lieu of answering the complaint. On May 14, 1992, the Resolution Trust Corporation ("RTC") as successor-in-interest to Home Savings moved to intervene to prevent KPERS from pursuing derivative claims owned by the RTC. While the RTC's motion was pending, the state court denied the Home Savings directors' motion to dismiss. The Home Savings directors then filed an answer which included a third-party claim against the RTC.

b. KPERS' Attempted Ex Parte Severance of the RTC Claims and Its Motions for Remand

KPERS responded to the RTC's joinder by filing an "emergency" severance motion "for the sole purpose of defeating [the RTC's] congressionally conferred right" to remove the case to federal court, 12 U.S.C. § 1441a(*l*)(3)(A). *KPERS v. Reimer & Koger Assocs., Inc. ("KPERS I")*, 4

F.3d 614, 617 (8th Cir. 1993), *cert. denied*, 511 U.S. 1126 (1994). The Kansas state trial judge granted KPERS' motion in an *ex parte* hearing held after normal business hours without notice to opposing counsel. *Id.* at 616-19. Notwithstanding the severance order, the RTC removed the case to federal court in Kansas City, Missouri, the location of Home Savings, on October 13, 1992.

KPERS sought remand on the ground that the third-party claims against the RTC had been severed so that only those claims had been removed to federal court. In an order affirmed by the Eighth Circuit, the district court denied remand because the state court's *ex parte* severance of the third-party claims violated the Supremacy Clause and was therefore void. *Id.* at 617; *see also id.* at 619 (sole purpose of the severance was to "keep the original action in state court by preventing the RTC from exercising its federal right to remove").

KPERS' renewed motion to remand following the dismissal of the RTC as a third-party defendant was denied because of the extraordinary actions taken by the state court to interfere with the RTC's statutory removal right, the significant federal judicial resources that had already been invested in the case, and the likelihood that the RTC would intervene again following any remand, resulting in the case returning to federal court. KPERS did not seek interlocutory review of that decision.

c. The Statute of Limitations Rulings

On October 22, 1993, the Home Savings director defendants filed a motion for summary judgment on their statute of limitations defense. KPERS opposed the motion on the ground that its claims arose from a governmental function and thus were exempt from any statute of limitations. Alternatively, KPERS argued that if its claims were subject to a statute of limitations, it was K.S.A. § 60-522, the ten-year

statute of limitations enacted in 1992 for claims asserted by KPERS. KPERS did not ask the district court to certify either of these issues of Kansas state law to the Kansas Supreme Court.

The motion was denied in part and granted in part. The district court held that Kansas limitations law, rather than the law of the forum, governed KPERS' claims. It rejected KPERS' argument that its investment activity was a governmental function but held that the newly-enacted special ten-year statute governed KPERS' claims and applied retroactively to revive even time-barred claims. *See KPERS v. Reimer & Koger Assocs., Inc.* (*KPERS III*), 61 F.3d 608, 610-11 (8th Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996).

The district court certified its ruling for interlocutory appeal, and the Home Savings directors appealed from the holdings adverse to them — that KPERS' claims are subject to Kansas limitations law and that they were retroactively revived by K.S.A. § 60-522. KPERS did not cross-appeal from the ruling that KPERS' claims are subject to applicable statutes of limitations because they arose from proprietary, rather than governmental, activity, nor did it request certification of that issue to the Kansas Supreme Court.

The case proceeded through fact discovery, and a trial date was set for January 1996. On July 27, 1995, the Eighth Circuit issued its decision reversing the district court. *KPERS III*, 61 F.3d 608. Applying federal choice of law principles made applicable by the RTC's removal under 12 U.S.C. § 1441a(*l*), the Eighth Circuit held that KPERS' claims are governed by the statute of limitations of the forum state, Missouri. Applying Kansas limitations law pursuant to the Missouri borrowing statute, it further held that the newly-enacted special ten-year statute did not revive claims that were already time-barred and remanded the case to the district court to determine if KPERS' claims were barred

under the two- and three-year Kansas statutes applicable to common law and statutory tort claims. *KPERS III*, 61 F.3d at 614-15.

In a petition for rehearing, KPERS asked the Eighth Circuit to certify the question of the retroactivity of the ten-year statute to the Kansas Supreme Court, but it did not request certification of whether KPERS performs a proprietary or governmental function for statute of limitations purposes. When the Eighth Circuit denied rehearing, KPERS filed a petition for certiorari raising only the retroactivity and federal choice of law issues, which was denied on February 20, 1996.

d. KPERS' Efforts To Disrupt the Progress of the Case

KPERS' response to *KPERS III* was a series of maneuvers which the district court and Eighth Circuit found were intended to delay the progress of the case in federal court. On August 23, 1995, KPERS filed duplicative lawsuits against the defendants in Kansas state court in an admitted effort to obtain a more favorable ruling on the statute of limitations issues. *See KPERS IV*, 77 F.3d 1063 (affirming district court injunction against KPERS initiating any additional duplicative suits in state court based on the Home Savings investments), *KPERS v. Reimer & Koger Assocs.* (*KPERS VIII*), 165 F.3d 627 (8th Cir. 1999) (affirming district court's order awarding sanctions relating to KPERS' filing of duplicative action).

On September 12, 1995, KPERS filed a third ("second renewed") motion to remand this case to state court and, at the same time, a motion for reconsideration and certification of the governmental-proprietary issue. In its order denying KPERS' motion for reconsideration, the district court described it as another "one of KPERS' attempts to avoid the impact" of *KPERS III*, raising no new issues, and noted

KPERS' earlier tactical decision not to present the governmental-proprietary issue to the Eighth Circuit when it had the opportunity in the *KPERS III* appeal.[1]

While KPERS' motions for remand and reconsideration were pending, KPERS also moved to disqualify District Judge D. Brook Bartlett as "part of a strategic and tactical plan to delay and prevent the district judge from ruling on the pending summary judgment motions" following the *KPERS III* decision. *In re KPERS ("KPERS V")*, 85 F.3d 1353, 1359-61 (8th Cir. 1996) (denying KPERS' petition for writ of mandamus to compel recusal).

e. The District Court's Holding That KPERS' Claims Are Time-Barred

Once KPERS' tactical motions were resolved, the district court turned to the motions for summary judgment filed by Shook Hardy and other defendants pursuant to the Eighth Circuit's *KPERS III* decision. The district court determined that KPERS' claims had all accrued by no later than December 1986, more than three years before KPERS sued.[2] The district court accordingly granted the motions, dismissed all of KPERS' claims against those defendants as time-barred, and entered final judgment pursuant to Fed. R. Civ. P. 54.

On appeal from the final judgment of dismissal, KPERS made its first request to the Eighth Circuit to certify the governmental-proprietary issue to the Kansas Supreme Court. In a May 13, 1997 decision, the Eighth Circuit held that its implicit ruling in *KPERS III* that KPERS was not exempt from generally applicable statutes of limitations was the law

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[1] *See KPERS v. Reimer & Koger Assocs., Inc.*, No. 92 CV 922, Order (W.D. Mo. Oct. 25, 1995).

[2] *See KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C. ("KPERS VI")*, 114 F.3d 679, 691 (8th Cir. 1997), *cert. denied*, 522 U.S. 1068 (1998).

of the case[3] and affirmed the district court's ruling that KPERS' claims were time-barred. KPERS' petition for rehearing and for rehearing *en banc* was denied by the Eighth Circuit on June 12, 1997, and the mandate issued on June 20, 1997.

f. The Kansas Supreme Court's Decision

After the Eighth Circuit issued its mandate, the Kansas Supreme Court issued its decision on statute of limitations issues in several KPERS failed investment cases pending in state court. *See KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321 (Kan. 1997). The Kansas Supreme Court disagreed with the Eighth Circuit's *KPERS III* decision concerning the specific Kansas limitations period applicable to KPERS and held that KPERS' claims are subject to the special KPERS ten-year statute of limitations enacted in 1992, not the two-and three-year statutes applicable to all other tort and statutory claims, and that the new statute retroactively revived barred claims.[4]

KPERS then filed a second petition for rehearing requesting the Eighth Circuit to vacate its judgment in *KPERS VI* and to recall its mandate to apply the Kansas Supreme Court's decision.[5] The Eighth Circuit denied the second petition on September 9, 1997. On September 10, 1997, KPERS filed its fourth petition for writ of certiorari,

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[3] *See KPERS VI*, 114 F.3d at 688 & n.11.

[4] Contrary to KPERS' suggestion, Petition ("Pet.") at 2, 13, the Kansas Supreme Court held that KPERS was not immune from statutes of limitations once the legislature adopted the special ten-year statute for KPERS.

[5] *See KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, Nos. 96-3262, 96-3317, 96-3680, Plaintiff-Appellant's Second Petition for Rehearing and Suggestion for Rehearing *En Banc* (8th Cir. filed July 16, 1997).

arguing that principles of federalism required a new rule compelling federal courts of appeal either to defer ruling or to certify questions of state law involving state-agency plaintiffs to a state court that is currently considering the same issue. The petition was denied on January 12, 1998. *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi*, 522 U.S. 1068 (1998).

The Eighth Circuit was then presented with the appeal in this case of co-defendant Michael Russell, whose *pro se* motion for summary judgment had been filed after the Eighth Circuit's *KPERS III* decision. *KPERS v. Russell* (*KPERS VII*), 140 F.3d 748 (8th Cir. 1998). Russell neither appeared nor filed a brief on appeal. Applying the intervening Kansas Supreme Court decision, the Eighth Circuit held that KPERS' claims against Russell were timely under the special ten-year statute of limitations for KPERS.

On April 20, 1998, KPERS moved for rehearing of this Court's denial of its petition for certiorari review of the decision affirming final judgment in favor of the other defendants because of the different outcome in the later Russell appeal. KPERS' motion was denied on May 18, 1998. 523 U.S. 1134 (1998). KPERS then moved in the district court for Rule 60(b) relief from final judgment on the same ground.

The district court denied KPERS' motion on multiple alternative grounds. First, the district court found that the grounds asserted in KPERS' Rule 60(b) motion had already been presented to the Eighth Circuit and rejected. Second, the district court found that neither the *Russell* decision nor the Kansas Supreme Court's decision was an "extraordinary circumstance" warranting relief under Rule 60(b). Finally, the district court found that the long history of the litigation and KPERS' misconduct throughout weighed strongly

against overturning the final judgment.[6] The Eighth Circuit affirmed on October 5, 1999. *KPERS v. Reimer & Koger Assocs., Inc.*, 194 F.3d 922 (8th Cir. 1999), Pet. App. at 1a.

The Eighth Circuit recited each of the grounds for the district court's holding and noted that the decision was based on equitable considerations as well, referencing the "history of this case" and various instances of litigation misconduct by KPERS. Pet. at 5a-6a. Although the Eighth Circuit acknowledged that the factors KPERS relied on as purported "extraordinary circumstances" under Rule 60(b) "have been considered relevant in other cases," it expressly held that those factors did not "compel the conclusion that the district court abused its discretion in denying KPERS's motion." Pet. at 5a.

On January 3, 2000, KPERS filed its fifth petition for certiorari, this time seeking review of the Eighth Circuit's decision affirming the district court's order denying Rule 60(b) relief.

REASONS FOR DENYING THE WRIT

I. KPERS' PETITION IS PREDICATED ON AN INCORRECT READING OF THE EIGHTH CIRCUIT'S OPINION.

KPERS' petition should be denied because it rests on a misreading of the Eighth Circuit's opinion. KPERS argues that the Eighth Circuit held that there were "extraordinary

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[6] *See* Appendix to KPERS' petition ("Pet. App.") at 11a ("Only passing familiarity with the history of this case in this court and in the appellate courts would convince any fair-minded person that the time has come to for this court to echo the Eighth Circuit Court of Appeals—this case is over. To the extent, if at all, that equitable considerations have an effect on Rule 60(b) relief, KPERS long-ago abandoned any persuasive claim to equity.").

factors" that "required granting" relief[7] but affirmed the district court solely because of litigation misconduct by KPERS earlier in the case. The effect of this purported holding, KPERS argues, was to "engraft[]" on to Rule 60(b) a new requirement that is inconsistent with both the Rule and precedent, and the application of which to KPERS violates principles of federalism. Pet. at 17-19.

The premise of KPERS' argument is wrong. The district court denied KPERS' Rule 60(b) motion for three reasons: because the grounds asserted in KPERS' motion had already been rejected by the Eighth Circuit; because there are no extraordinary circumstances that would warrant Rule 60(b) relief; and because various equitable considerations weigh against Rule 60(b) relief. Pet. App. at 9a-11a. The extent of the Eighth Circuit's holding concerning KPERS' proffered "extraordinary circumstances" was an acknowledgement that, "[w]hile these factors have been considered *relevant* in other cases, they do not compel the conclusion that the district court abused its discretion in denying KPERS's motion." Pet. App. at 5a (emphasis added). Nowhere did the Eighth Circuit even hint that these factors, either alone or in combination, would compel or even permit Rule 60(b) relief in this case.

KPERS also misrepresents the record when it claims that the equitable considerations identified by the district court and the Eighth Circuit consist exclusively of "unclean hands" arising from KPERS' efforts to have the statute of limitations issues decided by a Kansas state court.[8] The

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[7] Pet. at 16. *See also* Pet. at i, Question Presented ("Whether a sovereign State . . . may be denied Fed. R. Civ. P. 60(b) relief *to which it is otherwise entitled* . . . ." (emphasis added)).

[8] Neither the district court nor the Eighth Circuit used the term "unclean hands."

district court's consideration of equitable factors extended to the long "history of the case" and KPERS' course of conduct in its entirety, Pet. App. 5a-6a, including numerous and specific instances of misconduct by KPERS.[9]

Because the premise of KPERS' petition – that is was denied relief to which it was otherwise entitled as a result of an erroneous application of a "clean hands" requirement by the Eighth Circuit – is incorrect, its petition should be denied.

II. THE EIGHTH CIRCUIT DID NOT "ENGRAFT[] UPON RULE 60(b)" ANY GENERALLY APPLICABLE INQUIRY.

Even if the Eighth Circuit's affirmance rested exclusively on KPERS' litigation misconduct, that would not justify review by this Court. The Eighth Circuit did not, as KPERS asserts, Pet. at 19, either expressly or implicitly "engraft[] upon Rule 60(b)" a new inquiry concerning the balancing of equitable factors under Rule 60(b).

The Eighth Circuit's decision is an example of the routine application of the abuse of discretion standard of appellate review. It did not purport to establish any rule of general application beyond the facts of this particular case. Nothing in the Eighth Circuit's decision requires a district

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[9] Both the district court and the Eighth Circuit reference prior decisions reciting a range of misconduct of by KPERS in this case. *See* Pet. App. at 6a, *citing KPERS I*, 4 F.3d 614 (addressing KPERS' attempt early in the case to obtain an ex parte severance from the Kansas state court in order to frustrate the RTC's removal right). The district court also cited to *KPERS V*, 85 F.3d 1353, where the court of appeals found that KPERS had undertaken a "flurry of actions," including filing a motion to disqualify the district judge and a related petition for mandamus following denial of the motion, as "part of a strategic and tactical plan to delay and prevent the district judge from ruling on the pending summary judgment motions." *Id.* at 1359.

court generally to deny Rule 60(b) relief where the movant previously has engaged in litigation misconduct, or even to consider such misconduct in weighing the equities in future cases under Rule 60(b).

In the absence of any articulable rule flowing from the Eighth Circuit's opinion that courts could apply in future cases, the decision does not warrant review by the Court.

III. CONSIDERATION OF PRIOR LITIGATION MISCONDUCT AS AN EQUITABLE FACTOR UNDER RULE 60(b) IS AN APPROPRIATE EXERCISE OF DISCRETION.

A. The Eighth Circuit's Opinion Does Not Conflict with Rule 60(b) or Precedent.

Even if the Eighth Circuit had held that "unclean hands" arising from previous litigation misconduct, without more, was a sufficient ground for denying Rule 60(b) relief, such a holding would not "conflict[] with numerous decisions of this Court" and other circuit courts, Pet. at 17, 19. KPERS fails to identify a single case that is in actual conflict with the Eighth Circuit's decision.[10] Review is not

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[10] Trial courts do consider such conduct. *See, e.g., Sony Corp. v. S.W.I Trading, Inc.*, 104 F.R.D. 535, 541 (S.D.N.Y. 1985) (Rule 60(b) motion seeking relief for mistake denied because of movant's "unclean hands, both in violating plaintiffs' trademark and in violating the settlement agreement with plaintiffs not to infringe the Sony trademark"); *Nalco Chem. Co. v. Hydro Techs., Inc.*, 148 F.R.D. 608, 617 (E.D.Wis. 1993) (whether Rule 60(b) movant in trade secret case stole competitor information was relevant equitable factor in determining whether to grant relief from judgment). Not one of KPERS' cases has anything to do with Rule 60(b) and prior litigation misconduct, let alone holds that consideration of such misconduct would be an abuse of discretion.

called for in the absence of a real or intolerable conflict on the same matter of law or fact, which is not present here.[11]

KPERS' only real argument is that the decision below was wrong – hardly a reason to impose a new rule circumscribing the abuse of discretion standard traditionally applied by courts of appeal.[12] It is difficult to conceive of any practical rule that this Court could fashion that would not cause more harm than good. KPERS' suggestion of a bright-line rule that would bar appeals courts from considering prior litigation misconduct as a basis for denying Rule 60(b) relief would only invite litigants to engage in bad faith litigation tactics.

B. KPERS Was Not Placed in a Catch 22.

KPERS' argument that the Eighth Circuit's holding imposes an impermissible "Catch 22" on litigants is also flawed. According to KPERS, because it had to work "diligently to prevent the entry of [an] erroneous judgment" in order to be eligible for Rule 60(b) relief, Pet. at 20, its various maneuverings to put its claims before a Kansas state court cannot fairly constitute a bar to Rule 60(b) relief.

KPERS' argument is specious. On several occasions, KPERS crossed the line from zealous advocacy to overzealous, obstructionist and even sanctionable litigation con-

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[11] *See National Labor Relations Bd. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951).

[12] *See, e.g., In re: Emergency Beacon Corporation v. Barr*, 666 F. 2d 754, 760 (2d Cir. 1981) (trial court's discretion is "especially broad under subdivision (6), because relief under it is to be granted when appropriate to accomplish justice") (quotation omitted); *Lee v. Village of River Forest*, 936 F.2d 976, 979 (7th Cir. 1991) (abuse of discretion "established only when no reasonable person could agree with the district court.").

duct.[13] Nothing in Rule 60(b) or the cases interpreting it compels litigants to advocate to the brink of sanctions and beyond before they are entitled to seek relief under Rule 60(b). KPERS cannot cite a single case supporting its novel position.

C. The Eighth Circuit's Decision Is Not Contrary to Principles of Federalism.

KPERS' final argument -- that principles of federalism justify review because KPERS is a Kansas agency -- is meritless. KPERS argues that the prior efforts of a *state-agency* plaintiff in a federal case to have its claims decided by a state court cannot later be used as a basis for denying Rule 60(b) relief to which it would otherwise be entitled. Pet. at 21. This argument depends on the same mistaken premise that the Eighth Circuit held that KPERS was otherwise entitled to relief but for its "unclean hands."

Moreover, KPERS' suggestion that federalism immunizes state-agency litigants in federal court from equitable considerations applicable to other litigants is impractical. Such a rule permitting a state-agency to litigate in bad faith with impunity whenever its actions are directed to shifting the forum finds no support in principles of federalism.

The thrust of KPERS' argument concerning federalism is that the district court and court of appeals erred repeatedly in retaining jurisdiction over this case or in refusing to certify questions to the Kansas court because KPERS is a Kansas agency, *see* Pet. at 21-22. These arguments have

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[13] The Eighth Circuit has affirmed an award of attorneys' fees against KPERS under 28 U.S.C. § 1927, *KPERS VIII*, 165 F.3d at 629, and has sanctioned KPERS under Federal Rule of Appellate Procedure 38 for taking a frivolous appeal, (Eighth Circuit Order Dated October 4, 1999, in Case No. 97-2811, and Eighth Circuit Order Dated November 8, 1999, in Case No. 97-1880).

been considered and rejected in numerous prior rulings – on motions to remand, interlocutory appeals, and petitions for certiorari (*see* Pet. at 9-16) – and present no new basis for review by this Court.

CONCLUSION

For the reasons stated above, the Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 99-1125

In The

Supreme Court of the United States

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, INC.,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS DREISESZUN, OZAR, AND THE ESTATE OF FRANK S. MORGAN

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QUESTION PRESENTED

Did the court of appeals err in holding that the district court did not abuse its discretion in declining to reopen a final judgment, based on the unique facts and procedural posture of the case?

LIST OF PARTIES

Petitioner is the Kansas Public Employees Retirement System, Inc. (KPERS), the plaintiff and appellant below.

Respondents on this brief are Thomas S. and Marilyn J. Morgan, co-executors of the Estate of Frank S. Morgan; Sherman Dreiseszun; and I.I. Ozar, all defendants and appellees below.

Other respondents are KPMG Peat Marwick and Robert W.L. Spence; Shook, Hardy & Bacon, P.C., C. Patrick McLarney, and Frank Sebree; Blackwell Sanders Peper Martin, L.L.P. and William H. Sanders, Sr.; and Reimer & Koger Associates, Inc., Ken Koger, Ron Reimer, Clifford Shinski, Brent Messick, and Robert Crew.

In addition, the Resolution Trust Corporation (RTC) was a party to this case in earlier proceedings, and Michael Russell remains a defendant in the district court.

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BRIEF IN OPPOSITION FOR RESPONDENTS DREISESZUN, OZAR, AND ESTATE OF FRANK S. MORGAN

Respondents Dreiseszun, Ozar, and the Estate of Frank S. Morgan respectfully request that the Court deny the Petition for a Writ of Certiorari seeking review of the court of appeals' most recent decision in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 194 F.3d 922 (8th Cir. 1999) (*"KPERS IX"*), and is included in the Appendix to the Petition at App. 1a-6a.[1] The order of the district court denying relief from the judgment is unreported and is included in the Appendix to the Petition at 7a-11a. Previous opinions of the court of appeals in this case are reported: *KPERS v. Reimer & Koger Assocs., Inc.* (*"KPERS I"*), 4 F.3d 614 (8th Cir. 1993), *cert. denied*, 511 U.S. 1126 (1994); *KPERS v. Reimer & Koger Assocs., Inc.* (*"KPERS II"*), 60 F.3d 1304 (8th Cir. 1995); *KPERS v. Reimer & Koger Assocs., Inc.* (*"KPERS III"*), 61 F.3d 608 (8th Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996); *KPERS v. Reimer & Koger Assocs., Inc.* (*"KPERS IV"*), 77 F.3d 1063 (8th Cir.), *cert. denied*, 519 U.S. 948 (1996); *In re KPERS* (*"KPERS V"*), 85 F.3d 1353 (8th Cir. 1996); *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.* (*"KPERS VI"*), 114 F.3d 679 (8th Cir. 1997), *cert. denied*, 522 U.S. 1068 (1998); *KPERS v. Russell* (*"KPERS VII"*), 140 F.3d

[1] References to the Appendix to the Petition are "App. ___a."

748 (8th Cir. 1998); *KPERS v. Reimer & Koger Assocs.* (*"KPERS VIII"*), 165 F.3d 627 (8th Cir. 1999).

STATEMENT OF THE CASE

This case is over eight years old and has been heard by the Eighth Circuit on at least ten separate occasions. This Court has refused to review the case on four prior occasions. In 1996, the district court granted summary judgment for respondents and others on the basis that the claims of plaintiff-petitioner Kansas Public Employees Retirement System, Inc. (KPERS) were time-barred. The court of appeals affirmed the summary judgments, denied KPERS's petition for rehearing or rehearing en banc, and issued its mandate, making the case final. The Kansas Supreme Court later issued an opinion in unrelated cases brought by KPERS concerning wholly different KPERS investments, by which the Kansas court disagreed with the court of appeals' interpretation of Kansas limitations law. Subsequently, in this action, on the basis of the new Kansas Supreme Court decision, KPERS filed a motion for leave to file a second petition for rehearing or alternatively for recall of the mandate. The court of appeals denied that motion. KPERS also addressed the Kansas decision in its petition to this Court for a writ of certiorari and its later motion to this Court for leave to file a petition for rehearing, but the Court denied relief both times.

KPERS then filed a motion in the district court for relief from the summary judgments under Fed. R. Civ. P.

60(b)(6) on the basis of the Kansas Supreme Court decision, but the district court denied the motion. The court of appeals affirmed, holding that the district court did not abuse its broad discretion in following the established rule that an intervening change in state decisional law is not a proper basis for relief under Rule 60(b)(6) and in finding that, under the unique circumstances of this case, the equities did not weigh in favor of granting KPERS the equitable relief it sought. KPERS now seeks review in this Court of that decision by the court of appeals.

A. Factual and Procedural Background

The history of this protracted dispute is ably told by the court of appeals in the numerous reported opinions in this case. *See also* Brief of Respondents Dreiseszun, Ozar, and the Estate of Frank S. Morgan in Opposition to Petition for Writ of Certiorari, *KPERS v. Blackwell Sanders Matheny Weary & Lombardi, L.C.*, No. 97-471 (U.S.), at 3-9. Accordingly, only a brief summary of the relevant facts follows.

In this lawsuit, plaintiff KPERS brought claims against defendant-respondents Estate of Frank Morgan, Sherman Dreiseszun, and I.I. Ozar (the HSA defendants) and other defendants relating to KPERS's 1986 investment in high-yield, high-risk debt securities issued by Home Savings Association (HSA), a savings and loan association located in Kansas City, Missouri. The HSA defendants were members of the HSA board of directors. In 1991, KPERS filed suit against the HSA defendants and others in Kansas state court, alleging various causes of action in connection with the HSA investment. The HSA

defendants impleaded the Resolution Trust Corporation (RTC), the receiver for HSA, and the RTC removed the case to the United States District Court for the Western District of Missouri, as authorized by 12 U.S.C. § 1441(*l*). KPERS then obtained an *ex parte* order from the state court judge severing the claims against the RTC, in an effort to defeat removal of the entire case from the state court.[2] The district court subsequently denied KPERS's motion to remand the case to state court, and the court of appeals affirmed, holding that the *ex parte* severance order obtained by KPERS was unconstitutional, and that federal jurisdiction over the entire action was proper. *See KPERS I*, 4 F.3d at 616-22.[3] The RTC was eventually dismissed, and KPERS again moved to remand the case to state court, but the district court denied the motion. *See KPERS IV*, 77 F.3d at 1066.[4]

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[2] Kansas state court judges, as employees of the State of Kansas, are beneficiaries of KPERS.

[3] Thus, the claims against the RTC had not been "properly severed", as KPERS still suggests. *See* KPERS's Petition for a Writ of Certiorari at 6 n.4.

[4] In its Petition, KPERS has attempted to create the impression that the federal courts' jurisdiction over this case resulted from improper conduct by defendants and even the courts. *See* KPERS's Petition for a Writ of Certiorari at 2 (referring to defendants' "manipulative forum-shopping efforts"), 15 (referring to defendants' "engineering of the removal of this case"), 18 n.10 (referring to defendants' "manipulative motion practice"), 19 (same), 23 (referring to the "jurisdictional monopoly seized by the federal courts"). To the contrary, the RTC properly removed this action pursuant to statute, the district court properly assumed and maintained jurisdiction over the action, and the court of appeals properly affirmed the assumption of that jurisdiction. As demonstrated

Defendants moved for summary judgment, arguing that KPERS's claims were time-barred, but the district court denied the motions, concluding that KPERS's actions were timely under a new ten-year Kansas statute of limitations that was specifically enacted for KPERS. In *KPERS III*, the court of appeals reversed that decision. The court of appeals held that the limitations law of Missouri, the forum state, governed the action, and that Missouri's five-year statute would apply unless, under Missouri's borrowing statute, the actions would be barred by a shorter Kansas statute. *KPERS III*, 61 F.3d at 614. The court of appeals further held that the new specially-enacted Kansas ten-year statute did not contain sufficient language under established Kansas law to revive already-barred actions and thus did not apply in the present case. *Id.* at 615. The court of appeals therefore did not reach (and has never reached) the "troublesome" question of whether application of the ten-year statute would violate the Equal Protection Clause, and it remanded the case for the district court to determine whether KPERS's claims were time-barred under the

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in this Statement of the Case, KPERS continually flouted the federal courts' jurisdiction by engaging in unreasonable, vexatious, and bad faith conduct.

KPERS also defends its actions by arguing that defendants had contracted with a Kansas state agency and thus were "on notice" that they may face litigation in Kansas. *See* KPERS's Petition for a Writ of Certiorari at 21. In the same way, however, KPERS knowingly invested in a federally-insured savings and loan located in Missouri, and thus it was "on notice" and assumed the risk that any resulting litigation may take place in federal court in Missouri.

applicable two- and three-year Kansas statutes of limitations. *Id.* at 616. In *KPERS III*, KPERS did not challenge the district court's holding that KPERS was subject to limitations defenses because its investment activities were proprietary and not governmental in nature, *see id.* at 611-16, and thus KPERS may be said to have waived its argument on that issue.

Within a month of the court of appeals' decision in *KPERS III*, KPERS filed two state court actions against various of the defendants (not the HSA defendants) for damages arising out of the HSA investment. In one of the actions, defendants impleaded the RTC, who again removed the case to federal court. The federal district court then granted an injunction against KPERS's prosecution of the two new suits, noting that KPERS had filed the cases in an attempt "to obtain Kansas courts' more favorable rulings on the statute of limitations issue decided by the 8th Circuit Court of Appeals and also to escape a multitude of problems and issues that are causing delays in federal court." *KPERS IV*, 77 F.3d at 1067. The court of appeals upheld the injunction. *Id.* at 1067-71. The district court later awarded attorney fees and costs as a sanction against KPERS. *See KPERS VIII*, 165 F.3d at 629. The district court found that KPERS had acted "with objectively unreasonable behavior and bad faith" when it filed the parallel actions in state court. *Id.* The district court further found as follows:

> Furthermore, by filing the Kansas case, KPERS unreasonably and vexatiously delayed the processing of this case. Filing the Kansas case distracted both the other parties in this case and the court from our efforts to resolve the

> issues in this case in an efficient and expeditious manner. In addition, by filing a parallel suit in Kansas state court, KPERS multiplied the proceedings for [defendants] thereby unreasonably increasing the expense of the defense of this case.

Id. at 630. On appeal once again, the court of appeals affirmed the award of fees and costs, rejecting KPERS's arguments "that the attorneys' fees and costs were not substantially justified on the facts, and that its acts were not objectively unreasonable or in bad faith." *Id.*

KPERS's next move was its attempt to disqualify the presiding district court judge, who, by this time, had spent more time on this case than he had spent on any other case save one in the last ten years. *KPERS V*, 85 F.3d at 1355 n.3. In upholding the district court's denial of KPERS's disqualification motions, the court of appeals specifically noted KPERS's abusive litigation tactics:

> After our ruling that the ten-year Kansas statute of limitations does not apply to this case, KPERS undertook a flurry of actions which occupied the district court's time to the detriment of the efficient resolution of this case. As noted above, it filed a motion to have the court reconsider its April 1994 ruling regarding KPERS's proprietary capacity, it filed duplicative suits in Kansas state court necessitating the issuance of preliminary injunctions against it, and it filed a third motion to remand the case to Kansas state court. In his order of October 25, 1995, on the renewed motion to remand, the district judge noted that "since the Eighth Circuit Court of Appeals' decision on July 27, 1995, KPERS has taken a number of steps, including

> the filing of this motion, to delay the expeditious resolution of this case." When we affirmed the temporary injunctions prohibiting KPERS from pursuing the duplicative state court suits it filed after our July 27, 1995, statute of limitations decision, we noted that KPERS's purpose in filing the duplicative state suits was to obtain a favorable decision in the Kansas courts on the same statute of limitations issue we had already decided. We found the district court's finding that, by filing the duplicative state suits, KPERS had merely tried to " 'carve up what was one case into separate cases with separate claims, all leading to a subversion of the RTC's right to remove the entire case' " to be fully supported by the record and not clearly erroneous.

Id. at 1359 (citations omitted). The court of appeals further stated that its review of "KPERS' pattern of conduct" led it to conclude that "KPERS' recusal motion and this petition [for mandamus] were filed for tactical and strategic reasons, as opposed to concern about the impartiality of the trial judge." *Id.* at 1360.

On the basis of the remand ordered in *KPERS III*, defendants again moved for summary judgment. By two orders issued June 3, 1996 and July 25, 1996, the district court awarded summary judgment to all remaining defendants except Michael Russell, KPERS's former chairman, who had not retained counsel, on the basis that KPERS's claims were barred by Kansas's two- and three-year statutes of limitation. KPERS consented to certification of the summary judgment orders for immediate appeal under Fed. R. Civ. P. 54(b). In *KPERS VI*, the court of appeals agreed that the claims were time-barred under

those statutes and affirmed the summary judgments. *KPERS VI*, 114 F.3d at 688-92. The court of appeals also rejected the argument that KPERS had waived in *KPERS III*, namely that it was not subject to any statute of limitations because its investment function was governmental and not proprietary. Instead, the court of appeals held that the applicability of the Kansas two- and three-year statutes was the law of the case, although the court addressed (and rejected) this argument by KPERS only for the purpose of determining that recognition of the law of the case doctrine would not work a manifest injustice in this case. *Id.* at 687-88. On June 12, 1997, the court of appeals denied KPERS's petition for rehearing or rehearing en banc, and the court issued its mandate on June 20, 1997.

On June 27, 1997, the Kansas Supreme Court issued its opinion in *KPERS v. Reimer & Koger Associates, Inc.*, 941 P.2d 1321 (Kan. 1997). In that case, to which the HSA defendants were not parties, and which involved entirely different investments by KPERS, the Kansas Supreme Court ruled that KPERS's investment activity had been governmental in nature and that general statutes of limitations therefore did not apply. *Id.* at 1343. The Kansas Supreme Court also disapproved the decision in *KPERS III*, and held that the new Kansas ten-year KPERS statute of limitations did in fact revive already-barred actions. *Id.* at 1347.[5]

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[5] In an apparent effort to rely on equitable considerations for its own benefit, KPERS states in its Petition that defendants' favorable outcome resulted from "the accident of a week's timing" between the state court opinion and the final decision of

KPERS then filed a motion in the court of appeals in *KPERS VI* for leave to file a second petition for rehearing or for recall of the mandate, in which it argued that the Kansas state case warranted reversal of the summary judgments against it, but the court of appeals denied the motion. KPERS filed a petition for a writ of certiorari in this Court, again arguing that the Kansas case required a different result in *KPERS VI*. *See* Petition for a Writ of Certiorari, *KPERS v. Blackwell Sanders Matheny Weary & Lombardi, L.C.*, No. 97-471 (U.S. Sept. 10, 1997). In that petition, KPERS made the same basic argument that it makes here in its present petition: That under principles of federalism, if a state is litigating its own claims under its own state law, then a state court decision rendered after the federal appeals court has issued its mandate should nevertheless control – particularly in the "extraordinary" circumstances in which the case was in federal court against KPERS's will and the court of appeals declined to further delay the case or to certify the controlling issue to the state court. *See id.* On January 12, 1998, this Court denied the petition for a writ of certiorari. 522 U.S. 1068 (1998) (also rejecting GVR relief based on the Kansas decision).

In the meantime, defendant Russell, acting pro se, moved for summary judgment, and on March 4, 1997, the

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the court of appeals, which KPERS argues was rendered on an accelerated basis. *See* KPERS's Petition for a Writ of Certiorari at 15, 2. As this Statement of the Case demonstrates, however, any such proximity in time resulted solely from KPERS's repeated tactics to delay the federal court proceedings, and there is no basis in the record to argue that the court of appeals "accelerated" its decision.

district court awarded him summary judgment on the same basis as for the other defendants. Russell did not participate in KPERS's subsequent appeal. On March 30, 1998, the court of appeals issued its opinion in *KPERS VII*. On the basis of the intervening Kansas state case, the court of appeals reversed the summary judgment in favor of Russell and held that the claims against him were timely under the Kansas ten-year statute. *KPERS VII*, 140 F.3d at 751-52. The court of appeals expressly stated two times, however, that *KPERS VI* had become "final". *Id.* at 751.

On April 20, 1998, KPERS filed in *KPERS VI* a motion in this Court for leave to file a petition for rehearing, in which it argued again that the Kansas state case warranted a different result in the present case. *See* Motion for Leave to File Petition for Rehearing Out of Time, *KPERS v. Blackwell Sanders Matheny Weary & Lombardi, L.C.*, No. 97-471 (U.S. Apr. 20, 1998). This Court again failed to find the circumstances so extraordinary as to warrant relief, and on May 18, 1998, it denied the motion. *See* Order, No. 97-471 (U.S. May 18, 1998).

B. Opinions of the District Court and Court of Appeals

On May 21, 1998, KPERS filed its motion in the district court for relief from the summary judgments under Fed. R. Civ. P. 60(b)(6). On August 21, 1998, the district court denied the motion. The district court concluded that KPERS had not shown "exceptional circumstances justifying extraordinary relief" under Rule 60(b). *See* App. 10a-11a. The district court, citing the court of appeals' decisions in *KPERS V* and *KPERS IV*, further

found that "[t]o the extent, if at all, that equitable considerations have an effect on Rule 60(b) relief, KPERS long ago abandoned any persuasive claim to equity." App. 11a. As an alternative basis for denying relief, the district court concluded that it was not authorized to grant the requested relief because the court of appeals and this Court had already refused to grant KPERS relief in the face of the very same arguments advanced by KPERS. *See* App. 9a-10a.

In *KPERS IX*, the Eighth Circuit, having gained through numerous prior appeals a thorough knowledge of all aspects of this litigation and its participants, affirmed the district court's order, holding that the district court had not abused its discretion in denying KPERS relief under Rule 60(b)(6). *See* App. 1a-6a, 194 F.3d 922. After reviewing the case's procedural history and noting the abuse-of-discretion standard of review, the court of appeals stated the general rule, gleaned from the caselaw of various courts of appeal, that a change in law is not an "extraordinary circumstance" that would permit relief from a final judgment under Rule 60(b)(6). *See* App. 2a-4a, 194 F.3d at 924-25. Again relying on caselaw from numerous federal circuits, the court of appeals stated the following basis for that general rule:

> Society's powerful countervailing interest in the finality of judgments simply requires that each case have an end, though the law continues to evolve. "The common law could not safely develop if the latest evolution in doctrine became the standard for measuring previously resolved claims." Moreover, there is nothing in the Erie doctrine that requires federal courts to sacrifice the finality of their judgments because

> state courts subsequently interpret state law differently than the federal courts have done.

App. 4a-5a, 194 F.3d at 925 (citations and footnote omitted).

The court of appeals then listed the five factors that, according to KPERS, nevertheless made the case extraordinary. *See* App. 5a, 194 F.3d at 925-26. The court concluded that, "[w]hile these factors have been considered relevant in other cases, they do not compel the conclusion that the district court abused its discretion in denying KPERS's motion" for relief under Rule 60(b)(6). App. 5a, 194 F.3d at 926.[6] The court of appeals further noted the district court's allusion to KPERS's course of conduct during the litigation of this case, and gave the following examples:

> Early in this case, KPERS obtained an ex parte severance from the Kansas state court in order to frustrate removal. KPERS later filed parallel state court actions which were meant to subvert

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[6] KPERS has mischaracterized the opinion of the court of appeals in this regard. The court of appeals did *not* state or imply that the five factors cited by KPERS *required* granting relief under Rule 60(b)(6) under the circumstances present in this case. *See* KPERS's Petition for a Writ of Certiorari at 16. Rather, the court of appeals merely noted that such factors have been considered relevant under the circumstances present in other cases. Accordingly, by taking into account equitable considerations, the district court and the court of appeals did not deny KPERS relief "to which it would otherwise be entitled," as KPERS repeatedly insists. *See id.* at 17, 20, 22, 23. In other places in its Petition, KPERS notes that those other cases merely "authorize" – as opposed to compel – making an exception to the general rule against relief. *See id.* at 3, 15.

> federal removal jurisdiction. The district court held the filing of those cases to be objectively unreasonable and done in bad faith, and we affirmed.

App. 6a, 194 F.3d at 926.[7] The court of appeals concluded that the district court had properly given weight to equitable considerations in exercising its discretion under Rule 60(b) and declining to reopen the case. *Id.* Accordingly, the court of appeals found no abuse of discretion in the district court's denial of relief under the particular factual circumstances of this case. *Id.*[8]

REASONS FOR DENYING THE PETITION

This case is over. A final decision has been rendered and affirmed on appeal, and both this Court and the court of appeals have already refused on numerous occasions to undo that decision in the face of the same arguments, based on the same intervening state court case, as those advanced by KPERS here. In the face of those decisions, KPERS comes before this Court once again, arguing in essence that defendants and the lower courts

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[7] Thus, the court of appeals did not deny KPERS relief because it pursued efforts to keep the case in state court, *see* KPERS's Petition for a Writ of Certiorari at 3, 16; rather, the court of appeals cited some of the unreasonable, vexatious, bad faith tactics used by KPERS in that pursuit.

[8] The court of appeals did not address the district court's denial of relief under Rule 60(b)(6) on the alternative basis that it lacked authority to reopen the judgments for the reason that KPERS had already made the same arguments to the court of appeals and this Court.

have conspired to cheat KPERS of its claims. In fact, KPERS now challenges a discretionary ruling by the district court, by which the court refused, under the particular facts of this case, to depart from the general rule and grant rare and extraordinary relief from a final judgment. The court of appeals found that the district court did not abuse its broad discretion in so ruling. This Court should not disturb those rulings. Moreover, the decision of the court of appeals, which is based on particular facts and a unique procedural posture, not likely duplicated, does not depart from the decisions of this Court or any other court of appeals and is not worthy of discretionary review by this Court.[9]

Fed. R. Civ. P. 60(b)(6) allows a district court to relieve a party from a final judgment only in "extraordinary circumstances". *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1987) (citing *Ackermann v. United States*, 340 U.S. 193 (1950)). The important policy favoring finality of litigation mandates the rule, recognized by this Court and followed by every court of appeals that has considered the question, that an intervening change in decisional law does not constitute extraordinary circumstances and is not a proper basis for relief from a final judgment under Rule 60(b)(6). *See Agostini v. Felton*, 521 U.S. 203, 239 (1997); *Biggins v. Hazen Paper Co.*, 111 F.3d 205, 212 (1st Cir. 1997); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272-73 (2d Cir. 1994); *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir. 1982) (per curiam); *Dowell v. State Farm Fire & Casualty Auto. Ins. Co.*, 993 F.2d 46, 48

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[9] The unique procedural aspect of this case is due in part to the involvement of the RTC, which no longer exists.

(4th Cir. 1993); *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 159-60 (5th Cir. 1990); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628-30 (7th Cir. 1997); *Carter v. Romines*, 593 F.2d 823, 824 (8th Cir. 1979); *Tomlin v. McDaniel*, 865 F.2d 209, 211 (9th Cir. 1989); *Collins v. City of Wichita, Kan.*, 254 F.2d 837, 839 (10th Cir. 1958); *Booker v. Singletary*, 90 F.3d 440, 442 (11th Cir. 1996); *see also Liljeberg*, 486 U.S. at 873 (Rehnquist, J., dissenting) (noting that a "very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved"). This general rule is even stricter in a federal case where, as here, state law provides the rule of decision. *See Cincinnati Ins. Co.*, 131 F.3d at 628-29; *McGeschick v. Choucair*, 72 F.3d 62, 64 (7th Cir. 1995); *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 750 (5th Cir. 1995); *DeWeerth*, 38 F.3d at 1273-74. KPERS does not dispute these principles.

Contrary to KPERS's argument, the decisions of the district court and court of appeals did not necessarily depend upon an application of the "unclean hands" doctrine. In addition to citing an alternative basis for denying relief, the district court noted the absence of the required extraordinary circumstances before it separately found that KPERS had abandoned any claim to equity. Moreover, as explained above, the court of appeals did *not* conclude that the district court was compelled to grant KPERS relief but for the consideration of KPERS's abusive litigation tactics. Therefore, the very premise upon which KPERS's argument is founded is flawed.

At any rate, it is clear that equitable factors may be considered by the district court in ruling on a motion

under Rule 60(b)(6). This Court has noted that that provision may be used to vacate a judgment when "appropriate to accomplish justice." *Liljeberg*, 486 U.S. at 863 (quoting *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949)). Certainly, the concept of justice encompasses a consideration of equity. *See, e.g., Woods v. Kenan*, 173 F.3d 770, 780 (10th Cir.) (Rule 60(b)(6) is a grand reservoir of equitable power), *cert. denied*, 120 S. Ct. 187 (1999); *Samaras v. America's Favorite Chicken Co.*, 153 F.3d 268, 272 (5th Cir. 1998) (considering whether relief under Rule 60(b)(6) would be equitable), *cert. denied*, 526 U.S. 1017 (1999); *National Credit Union Admin. Bd. v. Gray*, 1 F.3d 262, 266 (4th Cir. 1993) (Rule 60(b)(6) is a grand reservoir of equitable power); *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990) (relief under Rule 60(b)(6) requires "unusual and extreme situations where principles of equity mandate relief"); *Hugel v. McNell*, 886 F.2d 1, 6 (1st Cir. 1989) (Rule 60(b)(6) allows relief when equitable considerations so counsel); *Peacock v. Board of Sch. Comm'rs of Indianapolis*, 721 F.2d 210, 214 (7th Cir. 1983) (relief is permitted under Rule 60(b)(6) when equitable action is appropriate to accomplish justice).[10]

In particular, courts have applied the equitable doctrine of "unclean hands" in considering relief under Rule 60(b). *See, e.g., National Org. for Women v. Operation Rescue*, 47 F.3d 667, 669 (4th Cir. 1995) (per curiam) (affirming

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[10] In this sense, KPERS's attempt to create a departure from existing caselaw by arguing that the court of appeals failed to balance finality with justice is misguided. Certainly, in this case the district court and the court of appeals considered all circumstances present in the case in determining whether justice required relief from the judgments.

district court denial of Rule 60(b)(6) relief where defendants' dilatory tactics gave them unclean hands "making them undeserving of equitable relief"); *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 681 (11th Cir. 1984) ("[T]his case is replete with inexcusable delay and numerous unjustified violations of the court's orders, which fully support the court's denial of relief under Rule 60(b)(6)."); *Nalco Chem. Co. v. Hydro Technologies, Inc.*, 148 F.R.D. 608, 617 (E.D. Wis. 1993) (doctrine of unclean hands is an equitable defense to a claim seeking an equitable remedy such as relief under Rule 60(b)); *Sony Corp. v. S.W.I. Trading, Inc.*, 104 F.R.D. 535, 541 (S.D.N.Y. 1985) ("[D]efendant cannot avail himself of the equitable considerations governing the application of Fed. R. Civ. P. 60(b)(6) because of his unclean hands. . . . ").

KPERS has not cited any cases holding or even suggesting that equitable factors may not be considered by a court in determining whether extraordinary circumstances are present as required for relief under Rule 60(b)(6). Accordingly, the consideration by the court of appeals of equitable factors does not create a split in caselaw among the courts of appeals or represent a departure from existing law from this Court. *See* Sup. Ct. Rule 10.

The district court's decision here, by which it weighed the specific facts over the course of the entire, protracted litigation, is subject to an abuse-of-discretion standard of review. *See Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) (ruling on Rule 60(b) motion is reviewed for abuse of discretion); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233 (1995)

(Rule 60(b) allows for discretionary revision of judgments). As the court of appeals held, the district court did not abuse its discretion in this case by refusing to depart from the general rule that an intervening change in law is not a sufficient basis for relief from a judgment under Rule 60(b)(6). The overarching interest in the finality of judgments is further strengthened here by the abusive litigation tactics and continual flouting of federal jurisdiction by KPERS of which the district court and court of appeals were so well aware. Certainly, the district court was not *required* to grant relief, as KPERS must show here. *See, e.g., Cincinnati Ins. Co.*, 131 F.3d at 626-30 (denying Rule 60(b)(6) in case analogous to present case). Indeed, a conclusion that the district court was *compelled* to depart from the general rule would eviscerate the discretionary nature of the district court's decision under Rule 60(b)(6).

The essence of KPERS's argument here is that its conduct did not, as a matter of law, constitute "unclean hands". Such argument was most properly considered by the district court, to whom the appellate courts must defer on questions involving the weighing of specific facts.

KPERS also insists that, under principles of federalism, its status as a state agency attempting to negotiate its way to state court somehow exonerates it regarding its abusive litigation tactics and makes such actions irrelevant for purposes of its motion for equitable relief.[11]

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[11] KPERS did not argue in the district court or the court of appeals that its status as a state agency and its purpose in

KPERS has not cited any authority, however, in support of the proposition that an instrument of the state may litigate in any manner it chooses and is immune from the adverse consequences of bad faith conduct that would attend any other litigant. Nor has KPERS offered any support for its argument that the ends may justify the means for purposes of Rule 60(b)(6) consideration.[12] Thus, once again the decision of the court of appeals does not conflict with established principles of law or a decision of this Court or any court of appeals. *See* Sup. Ct. Rule 10.

Finally, this Court has already heard the same arguments by KPERS and has nonetheless refused to find the circumstances so extraordinary as to warrant relief from the summary judgments. That fact further weighed against KPERS in seeking equitable relief, and in fact casts doubt on the availability of relief under Rule 60 in this case. *See Seese*, 679 F.2d at 337 (holding that the district court was without jurisdiction to alter the mandate of the court of appeals on the basis of a matter included or includable in the prior appeal).

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seeking to obtain a ruling in state court provided a basis for relief under Rule 60(b)(6), or precluded consideration of equitable factors. Instead, KPERS's federalism argument below was based solely on the fact that KPERS had not chosen the federal forum. Accordingly, KPERS may not now raise this argument for the first time in this context.

[12] In addition, KPERS's argument is outweighed by the principle of federalism that strengthens the general rule against Rule 60(b)(6) relief on the basis of an intervening change in law in federal cases controlled by state law.

As discussed above, KPERS has essentially argued its position on the merits of its case, i.e., that it was entitled to relief under Rule 60(b)(6). The merits alone are not sufficient, however, to warrant the granting of KPERS's petition. *See Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) (Court's review is discretionary and depends on factors *other than* the perceived correctness of the underlying judgment). This case simply does not meet the standards for discretionary review by this Court. As noted above, the decision of the court of appeals is not in conflict with established principles or any decision of this Court or a court of appeals. *See* Sup. Ct. Rule 10. Nor does this case present a question of public importance. *See id.*

The Court should not review a discretionary decision, by which the district court refused to depart from an established rule of law, based on specific facts and circumstances, including a procedural history not likely to be repeated; the issues raised by that decision are of interest only to these litigants and offer no potential for precedential effect. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955) (noting that certiorari should not have been granted in cases in which "the question was of importance merely to the litigants and did not present an issue of immediate public importance"); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."); *see also United States v. Johnston*, 268

U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.").

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 99-1125

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IN THE
Supreme Court of the United States

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, INC.,
Petitioner,
v.
REIMER & KOGER ASSOCIATES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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26PP

QUESTION PRESENTED

Whether the court of appeals properly held that the district court did not abuse its discretion in denying petitioner relief from judgment under Federal Rule of Civil Procedure 60(b)(6) where the district court based its holding on several alternative grounds, including findings (i) that there were no "extraordinary circumstances" warranting such relief and (ii) that petitioner had "long ago abandoned any persuasive claim to equity."

LIST OF PARTIES AND AFFILIATES

Petitioner neither provided a list of parties in accordance with Supreme Court Rule 14 nor included all parties in its caption. The following parties are respondents: Reimer & Koger Associates, Inc.; Ronald Reimer; Kenneth H. Koger; Clifford W. Shinski; Brent Messick; Robert Crew; Sherman Dreiseszun; I.I. Ozar; Frank Sebree; Gage & Tucker; Peat, Marwick, Mitchell & Co.; KPMG Peat Marwick LLP; Robert W.L. Spence; Thomas S. Morgan and Marilyn J. Morgan, co-executors of the estate of Frank S. Morgan; C. Patrick McLarney, substituted for Shook, Hardy & Bacon; Blackwell, Sanders, Peper, Martin, L.L.P., formerly known as Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.; and William H. Sanders, Sr.

In addition, Michael Russell was a defendant in the district court and the Resolution Trust Corporation was a third-party defendant in the district court, as well as a limited intervenor in that court.

Pursuant to Supreme Court Rule 29.6, respondent KPMG Peat Marwick LLP (now known as KPMG LLP) states that it is a limited liability partnership with no parent companies or publicly-held subsidiaries, and that respondent Peat, Marwick, Mitchell & Co. was its predecessor. Respondent Robert W.L. Spence is an individual.

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REIMER & KOGER ASSOCIATES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS KPMG PEAT MARWICK LLP AND ROBERT W.L. SPENCE

KPMG Peat Marwick LLP and Robert W.L. Spence (collectively, "KPMG") respectfully submit this brief in opposition to the petition for a writ of certiorari filed by the Kansas Public Employees Retirement System, Inc. ("KPERS").

DECISIONS BELOW

The decision below was the tenth decision by the Eighth Circuit arising out of this litigation, and this is petitioner's fifth petition for certiorari. *KPERS v. Reimer & Koger Assocs., Inc.*, 4 F.3d 614 (8th Cir. 1993) ("*KPERS I*"), *cert. denied*, 511 U.S. 1126 (1994); *Boatmen's First Nat'l Bank v. KPERS*, 57 F.3d 638 (8th Cir. 1995); *KPERS v.*

Reimer & Koger Assocs., Inc., 60 F.3d 1304 (8th Cir. 1995) ("*KPERS II*"); *KPERS v. Reimer & Koger Assocs., Inc.*, 61 F.3d 608 (8th Cir. 1995) ("*KPERS III*"), *cert. denied*, 516 U.S. 1114 (1996); *KPERS v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063 (8th Cir.) ("*KPERS IV*"), *cert. denied*, 519 U.S. 948 (1996); *In re KPERS*, 85 F.3d 1353 (8th Cir. 1996) ("*KPERS V*"); *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, 114 F.3d 679 (8th Cir. 1997) ("*KPERS VI*"), *cert. denied*, 522 U.S. 1068 (1998); *KPERS v. Russell*, 140 F.3d 748 (8th Cir. 1998) ("*KPERS VII*"); *KPERS v. Reimer & Koger Assocs., Inc.*, 165 F.3d 627 (8th Cir. 1999) ("*KPERS VIII*"); *KPERS v. Reimer & Koger Assocs., Inc.*, 194 F.3d 922 (8th Cir. 1999) ("*KPERS IX*") (Pet. App. 1a-6a). The district court's decision below is unreported. (Appendix to the Opposition, pp. 1a-6a ("Opp. App.").)

INTRODUCTION AND STATEMENT OF THE CASE

This is the fifth petition for certiorari that petitioner has filed in this case, which has resulted in ten published opinions from the United States Court of Appeals for the Eighth Circuit. Petitioner now seeks this Court's review of the Eighth Circuit's affirmance of the district court's discretionary decision not to revive this litigation under Federal Rule of Civil Procedure 60(b)(6). The petition, which largely rehashes arguments made in earlier appeals and petitions for certiorari, confirms that petitioner's latest efforts below and in this Court are in fact simply an attempt to revisit prior unfavorable rulings under the guise of Rule 60(b)(6). In any event, the lower courts' determination that the equities favor finality, given their long history with this case, is entitled to great deference. More importantly, the petition presents no question worthy of this Court's attention: the question presented rests on

a misreading of the opinions below, the purported "circuit split" is illusory only, and the unique facts of this case make it unsuitable for review. This litigation should be permitted finally to come to an end by denial of certiorari.

Petitioner's statement of the case is inaccurate in many respects. Nevertheless, for present purposes, only five corrections need be made.

1. Petitioner grossly mischaracterizes its role in this litigation, portraying itself as an innocent victim working always in good faith to obtain a definitive ruling on the applicable statute of limitations from the Kansas state courts. In reality, as the Eighth Circuit has found, petitioner engaged in numerous abusive and manipulative litigation tactics. Among other things, petitioner obtained a highly irregular *ex parte* severance order from the Kansas state trial judge to whom this case was originally assigned in an attempt to defeat removal jurisdiction, an order that the Eighth Circuit held was unconstitutional; this Court denied review. *KPERS I*, 4 F.3d at 619. As another example, petitioner sought disqualification of District Judge D. Brook Bartlett on spurious grounds in order to delay a decision on motions for summary judgment, which prompted the Eighth Circuit to comment: "[o]ur review of [petitioner's] pattern of conduct leads us to conclude that the defendants' allegation that [petitioner's] recusal motion and this [mandamus] petition were filed for tactical and strategic reasons, as opposed to concern about the impartiality of the trial judge, is correct." *KPERS V*, 85 F.3d at 1360. Petitioner has also had attorneys' fees assessed against it under 28 U.S.C. § 1927, *KPERS VIII*, 165 F.3d at 629, and has been sanctioned under Federal Rule of Appellate Procedure 38 for taking frivolous appeals (Eighth Circuit Order Dated

October 4, 1999, in Case No. 97-2811, and Eighth Circuit Order Dated November 8, 1999, in Case No. 97-1880).

2. Petitioner repeatedly complains that this case is not properly in federal court. To the contrary, the Resolution Trust Corporation ("RTC")—*not* respondents—removed the case to federal court under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), 12 U.S.C. § 1441a(*l*)(3), and the Eighth Circuit, in a ruling not challenged here, affirmed the initial removal. *KPERS I*, 4 F.3d at 621. After the third-party claims against the RTC were dismissed,[1] the district court exercised its discretion to retain the case based on the factors of judicial economy[2] and fairness to the parties[3] set forth in 28 U.S.C. § 1367. The Eighth Cir-

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[1] Petitioner's representation that, after the claims against it were dismissed, the RTC had "informed the district court that it had no further interest in the case remaining in federal court" (Pet. 6 n.4) is grossly misleading. The RTC was continually involved in this case to ensure that the claims being asserted by petitioner against certain defendants were not derivative claims that rightly belonged to the RTC as receiver of a failed savings and loan. In fact, the RTC itself moved to intervene in the case long before it was served with the third-party complaint. After the district court dismissed the third-party complaint against the RTC, it granted the RTC's motion for status as a limited intervenor. Thus, the RTC remained involved in the case after the dismissal of the third-party complaint against it, and it even attended depositions and hearings to protect its interests.

[2] As of June 30, 1994, *before* the Eighth Circuit's decision in *KPERS III* that engendered the majority of petitioner's abusive litigation tactics designed to delay or prevent implementation of that decision, the district court "had already spent more time on this case than any other case but one in 10 years." *KPERS V*, 85 F.3d at 1355.

[3] The district court's fairness concerns were based on the fact that all Kansas judges are beneficiaries of petitioner and on the unusual circumstances surrounding the state court judge's after-hours, *ex parte* severence of the claim against the RTC:

cuit again affirmed, holding that once the RTC becomes a party to a case, under 12 U.S.C. § 1441a(*l*)(1), "the entire action is 'deemed to arise under the laws of the United States' and is within the original jurisdiction of the district court." *KPERS IV*, 77 F.3d at 1067. That ruling, from which this Court denied certiorari, is not challenged here.

3. Petitioner's characterization of this action as "civil fraud claims . . . pursued by Kansas . . . in lieu of a criminal prosecution" (Pet. 21) is false. KPMG has never been charged with an intentional tort, but only with negligence. There is no basis whatsoever for Kansas to bring any criminal action against KPMG.

4. The district court did not deny petitioner relief from the final *KPERS VI* judgment based solely on petitioner's "unclean hands," as petitioner would have this Court believe. Rather, the district court first held that it did not have power to grant relief under Rule 60(b)(6). The court reasoned that the real basis for petitioner's motion was the Kansas Supreme Court's decision changing the applicable statute of limitations, and that petitioner had been denied relief based on that decision both

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My concern about fairness focuses on the appearances generated by the obvious benefit to any member of KPERS, including the Kansas judges, who could receive increased benefits if KPERS is successful in this case. Furthermore, as I stated at the Ju[ne] 30, 1994, hearing, the Shawnee County District judge's participation in KPERS' ex parte efforts to thwart the RTC's removal rights "creates a reasonable concern about the manner in which the parties to this case might be treated if [the case] is returned to . . . Shawnee County." Tr. 199. All of the parties in this case deserve a forum for the resolution of their dispute free of these influences.

(KPMG's *KPERS IV* Appendix in the Eighth Circuit, p. 39.) The district court's fairness concerns were not unfounded: the Kansas state trial judge was subsequently disqualified for personal bias from all litigation involving petitioner.

by the Eighth Circuit (which denied petitioner's motion for leave to file a second petition for rehearing in *KPERS VI*) and by this Court (which denied petitioner's petition for certiorari). (Opp. App. 4a (citing *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 (8th Cir. 1990), and *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 962 F.2d 1528, 1534 (10th Cir.), *cert. denied*, 506 U.S. 956 (1992)).) Petitioner does not challenge that holding by the district court here.

The district court went on to hold that even if it did have power to grant Rule 60(b)(6) relief, petitioner was not entitled to such relief under the law. (Opp. App. 5a.) The court explained that petitioner had "not satisfied its burden under Rule 60(b)(6)" because, even though the statute of limitations applied in *KPERS VII* (dealing solely with defendant Russell) was different from that applied in *KPERS VI* (affirming summary judgment to respondents) because of the intervening Kansas Supreme Court decision, "a change in or clarification of state law after a final decision in federal court is not an exceptional circumstance allowing the extraordinary relief of reopening the final *KPERS VI* judgment." (*Id.*)

The district court then discussed equitable considerations in conclusion, stating that "[o]nly passing familiarity with the history of this case in this court and in the appellate courts would convince any fair-minded person that the time has come for this court to echo the Eighth Circuit Court of Appeals—this case is over." (*Id.*) The court further added, "[t]o the extent, if at all, that equitable considerations have an effect on Rule 60(b) relief, [petitioner] long ago abandoned any persuasive claim to equity." (*Id.* at 5a-6a (citing *KPERS IV*, 77 F.3d at 1066 (holding that petitioner's wholly duplicative state court actions were an attempt to subvert federal removal jurisdiction), and *KPERS V*, 85 F.3d at 1359-60 (man-

damus petition that the Eighth Circuit found was filed for "tactical and strategic reasons, as opposed to concern about the impartiality of the trial judge")).)

5. The Eighth Circuit made no finding that "existing federal appellate precedent, applied in light of five extraordinary factors present in this case, required granting the relief requested." (Pet. 16.) To the contrary, the Eighth Circuit recognized only that the factors petitioner had identified in support of its Rule 60(b)(6) motion had "been considered relevant" in certain other cases, but held that they did "not compel the conclusion that the district court abused its discretion in denying [petitioner's] motion." (Pet. App. 5a.) Nor did the Eighth Circuit ignore the traditional balancing between finality, on the one hand, and the interest in justice, on the other. The Eighth Circuit recognized that "[s]ociety's powerful countervailing interest in the finality of judgments simply requires that each case have an end" and noted that petitioner had engaged in actions that were "objectively unreasonable and done in bad faith" and that attorneys' fees had been assessed against petitioner "for unreasonably and vexatiously multiplying proceedings." (*Id.* at 5a-6a.)

REASONS FOR DENYING THE PETITION

This petition presents no question worthy of this Court's attention. The question presented rests on erroneous factual and legal premises which, when corrected, make clear that petitioner seeks review of a decision properly decided under an abuse of discretion standard and applying well-settled legal principles to a unique set of facts. The purported "circuit split" is wholly illusory. Moreover, the highly unusual facts and procedural posture of this case make it particularly inappropriate for establishing precedent. The petition should be denied.

The factual and legal premises of the question presented—that petitioner's "unclean hands" result solely from petitioner's legitimate efforts to obtain a definitive ruling on the statute of limitations from the Kansas state courts and that petitioner would have been "entitled" to relief under Rule 60(b)(6) if its abusive and manipulative litigating tactics were set to one side—are both false. Petitioner's "unclean hands" result from its *illegitimate* litigating tactics, several of which petitioner does not mention in its petition. *See supra*, pp. 3-4. And the district court specifically found that petitioner was not "entitled" to Rule 60(b)(6) relief under the law without regard to the equities. (Opp. App. 5a.) Indeed, the district court found that it did not even have power to entertain petitioner's Rule 60(b)(6) motion. (*Id.* at 4a.)

The Eighth Circuit did not conclude that absent petitioner's "unclean hands" it would have been entitled to relief. On the contrary, the Eighth Circuit noted only that the factors cited by petitioner relating to Rule 60(b)(6) had been considered "relevant" in other cases but explicitly held that such factors *in this case* did *not* "compel the conclusion" that the district court had abused its discretion. (Pet. App. 5a.) Thus, petitioner merely seeks review of the Eighth Circuit's straightforward application of the abuse of discretion standard to the particular set of facts present here. That fact-bound question, involving no important or unsettled issues of law, does not warrant this Court's attention.[4]

Furthermore, petitioner's "unclean hands" are clearly relevant to the Rule 60(b)(6) inquiry. Petitioner's assertion that the Eighth Circuit's opinion "conflicts with nu-

[4] That conclusion is further dictated by the fact that the district court's decision is based on an alternative ground—that the district court lacked power to grant Rule 60(b)(6) relief—that the Eighth Circuit did not need to reach.

merous decisions of this Court and of other federal circuit courts" (Pet. 17) does not withstand scrutiny. Petitioner cites *no* case holding that courts must ignore a movant's "unclean hands" in ruling on a Rule 60(b)(6) motion. To the contrary, it is clearly established that relief from judgment under Rule 60(b)(6) "is equitable in nature" and that, in exercising its discretion under Rule 60(b)(6), "a court may always consider whether the moving party has acted equitably." 12 James W. Moore, *Moore's Federal Practice* ¶ 60.22[5] (3d ed. 1998); *see also* 11 Charles A. Wright et al., *Federal Practice and Procedure* § 2857 (1995) ("Equitable principles may be taken into account by a court in the exercise of its discretion under Rule 60(b)."). Petitioner's suggestion that the only equities that may be considered involve balancing finality against obtaining a purportedly "just" result is without support. (Pet. 17-18.) Petitioner cites no decision holding that a movant's bad-faith litigating tactics which manifestly increase the costs to both the federal courts and to the parties are irrelevant to whether justice would be accomplished in granting Rule 60(b)(6) relief. In fact, numerous decisions deny Rule 60(b)(6) relief on equitable grounds relating to the movant's conduct. *E.g., National Org. for Women v. Operation Rescue*, 47 F.3d 667, 669 (4th Cir. 1995) (*per curiam*) (affirming denial of Rule 60(b)(6) relief where district court found that movants' dilatory tactics gave them " 'unclean hands,' making them undeserving of the benefits of equitable relief"); *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 681 (11th Cir. 1984) (holding that "this case is replete with inexcusable delay and numerous unjustified violations of the court's orders, which fully support the court's denial of relief under Rule 60(b)(6)"); *cf. Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (*per curiam*) (a GVR order is inappropriate if it "is part of an unfair or manipulative litigation strategy").

This Court recently recognized that "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Agostini v. Felton*, 521 U.S. 203, 239 (1997). Petitioner thus seeks this Court's "guidance" concerning a legal scenario that rarely occurs. (Pet. 17.) In any event, the petition itself makes clear that no such "guidance" is necessary; the lower federal courts routinely balance the general interest in finality and the specific interest in achieving justice in considering whether to grant Rule 60(b)(6) relief. (Pet. 17-18 (citing cases).) Petitioner's unhappiness with the way the lower courts struck that balance in this case does not warrant this Court's review.

In addition, the highly unusual history and procedural posture of this case make it a particularly inappropriate case for announcing "guidance" on how Rule 60(b)(6) should be applied. First, the RTC's involvement in this case is critical, because that involvement converted this case into a federal-question case under 12 U.S.C. § 1441a(*l*)(1). Such circumstances are unlikely ever to recur, given that the RTC ceased to exist as of December 1995. *See* 12 U.S.C. § 1441a(m). Second, this case has had so many interlocutory appeals that the Eighth Circuit was unusually familiar with the facts, the law, and the parties' litigating tactics when it affirmed the district court's decision. Third, petitioner's bad-faith litigating tactics are unlikely to be precisely replicated. For these reasons, it would be difficult in this case to craft a useful rule of general applicability, and any rule created here would necessarily have little precedential value.

Finally, petitioner's suggestion that the denial of its request for relief is "unjust" is wrong. KPMG and its co-defendants have endured years of abusive litigation tactics, without which the final judgments in this case

would have been entered and affirmed years ago, long before the Kansas Supreme Court's decision. Moreover, finality is an important part of justice. *See Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931) ("Public policy dictates that there be an end of litigation . . . ."); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628 (7th Cir. 1997) ("the need for the finality of judgments is an overarching concern"). Any assessment of finality necessarily involves consideration of the course of the prior litigation, including the expenses of the courts and of the parties (especially where such expenses were increased due to abusive and strategic litigation tactics, as in this case). *See Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 831 (7th Cir. 1985) (in weighing Rule 60(b) relief, district court must consider the costs to the parties and to society).[5] Finally, petitioner could not prevail against KPMG in any event, because KPMG is entitled to summary judgment on the alternative ground that, as the undisputed facts that the Eighth Circuit has already affirmed show, nothing KPMG did caused petitioner to suffer any losses.[6] There is nothing "unjust" about denying petitioner's Rule 60(b)(6) motion.

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[5] As Chief Justice Rehnquist has observed in the context of GVR orders, "requiring the Court of Appeals to delve into the facts and law of [a] case again, months after it denied rehearing, is not without cost. The typical active judge of the Court of Appeals for the Eleventh Circuit participates in somewhere between 150 and 200 panel decisions each year. For us to require a busy court to once more revisit the merits of this state law dispute gives these petitioners more of the time and resources of the federal judicial system than they deserve." *Thomas v. American Home Prods., Inc.*, 117 S. Ct. 282, 285 (1996) (Rehnquist, C.J., dissenting from GVR order). This observation is particularly apposite here, where the Eighth Circuit has already considered the case ten times.

[6] The very same facts that the district court found were undisputed, and that caused petitioner's claims to be barred under the

CONCLUSION

The petition for a writ of certiorari should be denied.

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two-year statute of limitations, compel a finding that nothing KPMG did caused petitioner to suffer any of its alleged losses. Petitioner claims that it suffered losses because it continued to make direct placement investments as a result of KPMG's alleged failure to report that investments in petitioner's portfolio had suffered permanent impairment in the amount of $35 million as of June 30, 1988. The district court found, and the Eighth Circuit affirmed, however, that the undisputed facts show that petitioner was on notice of the purported fraud with respect to those investments in December 1986 and took no action. (R. 878 (granting summary judgment to all defendants except Michael Russell and KPMG), p. 51); *see also KPERS VI*, 114 F.3d at 689-90. The district court also found, and the Eighth Circuit affirmed, that the undisputed facts show that petitioner had knowledge of at least $51 million of permanent impairment in its private placement investment portfolio by September 1989, yet it took no action to stop its direct placement investments. (R. 896 (granting summary judgment to KPMG), pp. 12-13); *see also KPERS VI*, 114 F.3d at 692 (recognizing that successor auditor indicated that impaired investments could be as high as $75 million). Although neither the district court nor the Eighth Circuit needed to reach that alternative ground for summary judgment, the undisputed facts show that the causal connection alleged by petitioner did not exist.

Respectfully submitted,

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February 3, 2000

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APPENDIX *

[Filed Aug. 19, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 92-0922-CV-W-9
No. 95-0819-CV-W-9

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff,

v.

MICHAEL RUSSELL,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(6), FEDERAL RULES OF CIVIL PROCEDURE

I. BACKGROUND

On June 3 and July 25, 1996, I entered orders granting summary judgment in favor of all defendants, except Michael Russell, in this case. KPERS appealed.

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* Respondents have reproduced the district court's opinion because of the numerous omissions and typographical errors in the Petitioner's Appendix.

Defendant Russell, representing himself, subsequently moved for summary judgment. On March 4, 1997, I entered an order granting Russell's motion. KPERS appealed the March 4, 1997, order. Russell did not participate in the appeal and did not file a brief in the Eighth Circuit Court of Appeals supporting his position.

On May 13, 1997, the Eighth Circuit Court of Appeals affirmed the June 3, and July 25, 1996, orders granting summary judgment to all defendants except Russell. *See KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, 114 F.3d 679 (8th Cir. 1998) (*KPERS VI*). The Eighth Circuit Court of Appeals denied KPERS' motions for rehearing and rehearing en banc on June 12, 1997. The Eighth Circuit Court of Appeals issued its mandate on June 20, 1997.

On June 27, 1997, the Kansas Supreme Court entered an order interpreting Kansas law applicable to KPERS. *KPERS v. Reimer & Koger Assoc., Inc.*, 262 Kan. 635, 941 P.2d 1321 (1997). Specifically, the Kansas Supreme Court disagreed with the Eighth Circuit Court of Appeals' prior rulings and held that claims by KPERS are not governed by the general two and three year statutes of limitations. *Id.*

KPERS did not file any motion in this court seeking relief based on the Kansas Supreme Court's June 27, 1997, decision.

On or about July 17, 1997, in *KPERS VI*, KPERS filed with the Eighth Circuit Court of Appeals a Motion for Leave to File Instanter a Second Petition for Rehearing Out of Time or, Alternatively, to Recall Mandate for the Purpose of Conforming Decision to Recent Controlling Decision of State Law. KPERS argued that the decision of the Kansas Supreme Court should control the statute of limitations issues in *KPERS VI*. On September 9, 1997,

the Eighth Circuit Court of Appeals denied the motion to file a second petition for rehearing or to recall the mandate. On January 12, 1998, the United States Supreme Court denied certiorari. *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, —— U.S. ——, 118 S. Ct. 738 (1998).

KPERS' appeal of my order granting summary judgment to Russell was pending at the time of the Kansas Supreme Court's June 27, 1997, order. On March 30, 1998, the Eighth Circuit Court of Appeals reversed the March 4, 1997, order granting summary judgment to defendant Russell on the ground that there had been an intervening change in state law. *KPERS v. Russell*, 140 F.3d 748 (8th Cir. 1998) (*KPERS VII*).

The Eighth Circuit Court of Appeals in *KPERS VII* declined to follow the holding in *KPERS VI* because the Kansas Supreme Court's decision was handed down after *KPERS VI* but before the decision in *KPERS VII*. *Id.* at 751. The Eighth Circuit Court of Appeals stated that "*KPERS VI* became final" when the United States Supreme Court denied certiorari on January 12, 1998. *Id.*

On April 20, 1998, KPERS filed with the United States Supreme Court a Motion for Leave to File Petition for Rehearing Out of Time, and Petition for Rehearing. Based on the Eighth Circuit Court of Appeals' *KPERS VII* decision, KPERS asked the Supreme Court to vacate the January 12, 1998, denial of certiorari in *KPERS VI*. KPERS presented the same arguments to the Supreme Court that are presently before this court. On May 18, 1998, the Supreme Court denied KPERS' motion.

On May 21, 1998, KPERS filed in this court a Rule 60(b)(6) Motion for Relief from Judgment. Based on the Eighth Circuit Court of Appeals' decision in *KPERS VII*, KPERS seeks relief from the 1996 orders involved in *KPERS VI* granting summary judgment to all defend-

ants except Russell. *See* Reply Memorandum, pp. 6-7 ("it is not the Kansas Supreme Court's ruling alone that warrants Rule 60(b) relief in this case, it is the 8th Circuit's ruling in *KPERS VII*").

II. DISCUSSION

A. Rule 60(b) Does Not Authorize this Court to Review Appellate Court Decisions Rejecting the Basis of KPERS' Argument for Rule 60(b) Relief

Rule 60(b) does not give a court the power to revisit an issue already decided by an appellate court. *See, e.g., Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 (8th Cir. 1990); *Colorado Interstate Gas v. Natural Gas Pipeline*, 962 F.2d 1528, 1534 (10th Cir. 1992) ("district court must comply strictly with the mandate rendered by the reviewing court.").

KPERS argues that it is not asking for relief based on the Kansas Supreme Court decision but on the reasoning of the Eighth Circuit Court of Appeals in *KPERS VII*. However KPERS wraps the package, the foundation of KPERS' argument here, and in *KPERS VII* and in its July 17, 1997, Motion for Leave to File a Second Petition for Rehearing in *KPERS VI*, is that the decision of the Kansas Supreme Court, not the decision of the Eighth Circuit Court of Appeals, establishes the applicable statute of limitations. When presented with KPERS' argument, the Eighth Circuit Court of Appeals refused to grant a rehearing or to recall its mandate in *KPERS VI*. Thereafter, when presented with the same argument, the United States Supreme Court denied certiorari.

Under these circumstances, Rule 60(b) does not authorize this court to grant relief from the final judgment in *KPERS VI*.

B. KPERS Is Not Entitled to Relief Under Rule 60(b)

Even if one accepts KPERS' argument that it has not already presented to appellate courts the argument made here, KPERS is not entitled to relief under Rule 60(b). The reasoning of the Eighth Circuit Court of Appeals in *KPERS VII* cannot possibly produce the same result in *KPERS VI* because the procedural facts in *KPERS VI* are crucially different from the procedural facts in *KPERS VII*. *KPERS VI* was finally decided by the Eighth Circuit Court of Appeals *before* the Kansas Supreme Court decision. The crucial factual difference that led the Eighth Circuit Court of Appeals to reach a result in *KPERS VII* that was different from the result in *KPERS VI* was that the Eighth Circuit Court of Appeals decided *KPERS VII* *after* the Kansas Supreme Court decision was issued. Therefore, applying the reasoning of *KPERS VII* to the facts in *KPERS VI* would produce a different result in *KPERS VI* than was reached in *KPERS VII*.

Furthermore, Rule 60(b) provides for relief "only where the movant has shown exceptional circumstances." *Hepper v. Adams County*, 133 F.3d 1094, 1096 (8th Cir. 1998). For the reasons stated at ¶ 4-9 of defendant KMPG Peat Marwick and Robert W.L. Spence's Memorandum of Law, a change in or clarification of state law after a final decision in federal court is not an exceptional circumstance allowing the extraordinary relief of reopening the final *KPERS VI* judgment. Therefore, plaintiff has not satisfied its burden under Rule 60(b)(6).

III. CONCLUSION

Only passing familiarity with the history of this case in this court and in the appellate courts would convince any fair-minded person that the time has come for this court to echo the Eighth Circuit Court of Appeals—this case is over. To the extent, if at all, that equitable considera-

tions have an effect on Rule 60(b) relief, KPERS long ago abandoned any persuasive claim to equity. *See In re KPERS*, 85 F.3d 1353, 1359-60 (8th Cir. 1996); *KPERS v. Reimer & Koger Assoc., Inc.*, 77 F.3d 1063, 1066 (8th Cir.), 117 S. Ct. 345 (1994).

Because this court is without power to grant relief when higher courts have refused to grant relief when presented with the very reasons advanced here and because plaintiff has not demonstrated exceptional circumstances justifying extraordinary relief, KPERS' Rule 60(b)(6) motion will be denied.

Accordingly, it is ORDERED that KPERS' Rule 60 (b)(6) Motion for Relief from Judgment is denied.

/s/ D. Brook Bartlett
D. BROOK BARTLETT
United States District Judge

Kansas City, Missouri
August 19, 1998.

No. 99-1125

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

BLACKWELL, SANDERS, MATHENY, WEARY & LOMBARDI, L.C., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.L.P. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: February 3, 2000

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COUNTER STATEMENT OF QUESTION PRESENTED

Respondent respectfully suggests that the issue framed by petitioner is more accurately stated as follows:

Whether it was an abuse of discretion to deny petitioner relief under Fed. R. Civ. P. 60(b) when petitioner's same request for relief was previously rejected twice by the courts: first in petitioner's interlocutory appeal to the Eighth Circuit in 1995, a decision this Court declined to review in 1996, and second in petitioner's motion for leave to file a second rehearing petition or to recall the mandate filed with the Eighth Circuit in 1998, which this Court separately declined to review in January 1998.

PARTIES TO THE PROCEEDING

The named respondents to this case are: Reimer & Koger Associates, Inc.; Ronald Reimer; Kenneth H. Koger; Clifford W. Shinski; Brent Messick; Robert Crew; Sherman Dreiseszum; I.I. Ozar; Frank Sebree; Peat, Marwick, Mitchell & Co.; KPMG Peat Marwick; Robert Spence; Thomas S. Morgan, co-executor of the estate of Frank S. Morgan; Marilyn J. Morgan, co-executor of the estate of Frank S. Morgan; Shook, Hardy & Bacon, through C. Patrick McLarney, substituted for Shook Hardy law firm; and Blackwell Sanders Matheny Weary & Lombardi, L.L.P., now known as Blackwell Sanders Peper Martin L.L.P.

RULE 29.6 STATEMENT

Respondent Blackwell Sanders Matheny Weary & Lombardi, L.L.P. is a Kansas City, Missouri-based law firm, with other offices in and outside of Missouri, operating as a limited liability partnership under the law of the State of Missouri.[1] Its member attorneys possess complete ownership of the firm, and the firm possesses no other ownership interests.

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[1] The firm's name is now Blackwell Sanders Peper Martin L.L.P.

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STATEMENT OF THE CASE[2]

Petitioner Kansas Public Employees Retirement System (KPERS) is the retirement plan for the employees of the State of Kansas, including all Kansas state-court judges. KPERS claims that it lost a substantial amount of money in the 1980's on its direct placement and other venture capital investments. In the 1990's, KPERS sued everyone involved with those unsuccessful investments, including the lawyers who prepared the transaction documents at the direction of KPERS's investment advisors. All of the lawsuits were filed in Kansas state courts. This case is the only one that was removed to federal court.

This suit pertains to KPERS's 1986 investment in Home Savings Association, a federally insured savings and loan. Respondent Blackwell Sanders served as counsel to KPERS's investment advisor, Reimer & Koger Associates, Inc. (R&K), for the first Home Savings investment transaction from January to May 1986. *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, 114 F.3d 679, 683 (8th Cir. 1997) (*KPERS VI*). Blackwell Sanders prepared documents necessary to close the investment transaction but did not represent R&K or KPERS on a continuing basis. In December 1986, after the investment had been made, articles in the *Kansas City Star* raised questions regarding the wisdom of KPERS's investment in Home Savings and certain conflict of interest issues involving Michael Russell, KPERS's chairman. *Id.* In 1991, KPERS filed this lawsuit. *Id.* at 684. Blackwell Sanders,

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[2] This statement is substantially similar to the statement contained in Blackwell Sanders's opposition to KPERS's petition for certiorari, case No. 97-471.

however, was not sued until 1995 – almost nine years after its involvement in the initial Home Savings investment ended. *Id.* at 685.

The principal legal issues that KPERS now raises were first decided by a court in 1995. *KPERS v. Reimer & Koger Assocs., Inc.*, 61 F.3d 608, 615 (8th Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996) (*KPERS III*). At that time, KPERS sought interlocutory review to determine what statute of limitations was applicable to KPERS's claims. In that appeal the Eighth Circuit held that (1) when a case is removed under 12 U.S.C. § 1441a(*l*)(3), as this one was, the limitations law of the forum – here, Missouri – applies; (2) under Missouri law, KPERS's claims are subject to Missouri's five-year statute of limitations unless "fully barred" by a shorter statute of limitations in the state where the lawsuit originated; and (3) the applicable Kansas limitations statutes[3] fully barred KPERS's claims because the special ten-year "KPERS" statute of limitations,[4] while applying "retroactively" to extend the limitations period for accrued but not yet barred claims, did not revive already barred claims such as KPERS's claims

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[3] Kan. Stat. Ann. §§ 60-512, 513 (three years for statutory claims; two years for tort claims).

[4] Shortly after the defendants filed their motions to dismiss in state court, the Kansas legislature adopted a ten-year statute of limitations applicable only to civil actions brought by KPERS. Kansas Laws 1992, ch. 321, § 21 (codified at Kan. Stat. Ann. § 60-522). After the defendants argued that the new statute did not apply to claims already expired, the legislature amended the statute so that it would be "construed and applied retroactively." 1993 Kansas Session Laws ch. 227 (H.B. 2211) (codified at Kan. Stat. Ann. § 60-522(c)).

against Blackwell Sanders. *Id.* at 615. This Court denied KPERS's petition for writ of certiorari in that appeal. *KPERS v. Reimer & Koger Assocs., Inc.*, 516 U.S. 1114 (1996).

Applying *KPERS III* on remand, the District Court concluded that KPERS's claims were barred by the two and three-year Kansas statutes of limitation and entered summary judgment in favor of all of the defendants. *KPERS v. Reimer & Koger Assocs., Inc.*, Nos. 92-0922 & 95-0819, Order Granting Defendants' Motions for Summary Judgment (W.D. Mo. June 3, 1996). KPERS appealed this decision and the Eighth Circuit affirmed.[5] *KPERS VI*, 114 F.3d 679 (8th Cir. 1997). KPERS argued that under Kansas law no statute of limitations applied to its claims

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[5] KPERS continues to claim that the Eighth Circuit decided this appeal with "unusual haste," apparently because the case was set for oral argument in March 1997 after the calendar of arguments for that month had been issued. Although KPERS implies that the setting of this argument was motivated by improper considerations, a much more plausible explanation exists. As a matter of sound judicial administration, and in order to conserve judicial resources, related cases are generally assigned to the same panel that decided earlier appeals in the same case. The KPERS cases have all been decided by panels consisting of Judges Theodore McMillian (St. Louis, Missouri); John R. Gibson (Kansas City, Missouri) and either Pasco M. Bowman (Kansas City, Missouri) or David R. Hansen (Cedar Rapids, Iowa). The court's annual Kansas City court session was scheduled for March 1997, and Judges McMillian, Bowman, and Gibson were already scheduled to sit in Kansas City that month. Moreover, many of the attorneys involved in this case are located in Kansas City. Thus, it was much more convenient for the court and the parties for the case to be scheduled for argument in Kansas City in March 1997.

because maintaining KPERS is a governmental, not a proprietary, function of the State of Kansas. In *KPERS VI*, the court of appeals held that KPERS was prohibited by the law-of-the-case doctrine from relitigating the applicability of the two and three-year Kansas statutes of limitations even though KPERS's argument regarding KPERS's functions was not specifically addressed in *KPERS III*. Further, the court found that application of the law-of-the-case doctrine would not result in a manifest injustice, *id.* at 687, because KPERS's arguments were foreclosed by then-controlling Kansas Supreme Court precedent. *In re Midland Indus.*, 703 P.2d 840 (1985). In *Midland Industries*, the Kansas Supreme Court held that "[m]aintaining KPERS is a *proprietary* function of the state." *Id.* at 843. Thus, the Eighth Circuit held that the "clear holdings" of *Midland Industries* "compel rejection of KPERS's argument" that it is not subject to any statute of limitations because its investments were made in a governmental capacity. *KPERS VI*, 114 F.3d at 688.

The Eighth Circuit issued its opinion in *KPERS VI* on May 13, 1997, and denied KPERS's petition for Rehearing and Suggestion for Rehearing En Banc on June 12, 1997. KPERS filed a second rehearing petition after the mandate issued that was also denied.

On June 27, 1997, after the Eighth Circuit had already denied KPERS's initial petition for rehearing, the Kansas Supreme Court held, in another case brought by KPERS relating to its investments, that KPERS acts in a governmental capacity when it invests its funds. *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321, 1325-26 (1997). The court characterized its earlier statement to the contrary in *Midland Industries* as "pure dicta," *id.* at 1340, and

asserted that the Eighth Circuit's decision "regarding governmental-proprietary functions" was incorrect, *id.* at 1343. The Kansas Supreme Court acknowledged, however, that the Eighth Circuit's holding in *KPERS VI* was that KPERS's governmental-function argument was barred under the law-of-the-case doctrine. *Id.* at 1338. And, moreover, the new Kansas decision did not address the impact of the Missouri borrowing statute on the analysis. KPERS filed a certiorari petition with this Court in 1997 seeking review of the Eighth Circuit's decision in *KPERS VI*, arguing that the new decision by the Kansas Supreme Court required reversal. This Court again denied certiorari. *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi*, 522 U.S. 1068 (1998).

After KPERS's second certiorari petition seeking review of the statute of limitations question was denied, KPERS returned to the District Court and filed a motion for relief under Rule 60(b) raising the *same arguments* it raised in *KPERS III* and *KPERS VI* and the earlier petitions filed in this Court. The District Court denied KPERS's motion, holding that it was not empowered under Rule 60(b) to revisit issues previously decided by the appellate courts and, in any event, KPERS was not entitled to relief because it had not demonstrated exceptional circumstances or equitable justification warranting the extraordinary relief of reopening the final judgment. *KPERS v. Russell*, Nos. 92-0922; 92-0819, Order Denying Plaintiff's Motion for Relief From Judgment Pursuant to Rule 60(b)(6) (W.D. Mo. August 19, 1998). The Eighth Circuit affirmed this decision in October 1999.

KPERS v. Reimer & Koger Assocs., Inc., 194 F.3d 922 (8th Cir. 1999).

REASONS FOR DENYING THE WRIT

I. This Court Should Not Grant a Petition for a Writ of Certiorari Because the Issue Raised By Petitioner Was Raised in Two Previous Petitions to This Court That Were Denied, There is No Conflict or Need For Clarification as to the Application of Rule 60(b), and the Case Will Have No Precedential Value.

The question raised by KPERS in its latest petition has been considered twice before by both the District Court and the Eighth Circuit. This Court has twice denied certiorari. It should do so again.

KPERS first raised the issue of what statute of limitations applies to its claims in a 1995 interlocutory appeal to the Eighth Circuit. KPERS lost, and this Court denied KPERS's request for review of that decision. KPERS raised this issue in a second appeal to the Eighth Circuit in 1997. KPERS lost again, and again this Court denied KPERS's request for review. This is KPERS's third attempt to obtain a different ruling on the statute of limitations issue. This petition has no more merit than KPERS's earlier filings.

KPERS's attempt to use Rule 60(b) to revisit an issue previously decided by the appellate court is improper. *See, e.g., Colorado Interstate Gas v. Natural Gas Pipeline*, 962 F.2d 1528, 1534 (10th Cir. 1992), *cert. denied*, 506 U.S. 956 (1992); *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 (8th Cir. 1990); *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337

(3d Cir. 1982); 11 Charles Alan Wright et al., Federal Practice And Procedure § 2873, at 439 (2d ed. 1995) (noting that under Rule 60 "the district judge is not free to flout the decision of the appellate court"). Both the District Court and the Eighth Circuit correctly concluded that Rule 60(b) cannot be used for this purpose and KPERS can identify no contrary authority. There is no conflict here. Nor is there any need for the Court to clarify the applicability of Rule 60(b) to KPERS's issue, an issue that has already been finally decided. This case can have no precedential value and there is no reason to grant the petition. *See Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 79 (1985); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Relief may be obtained under Rule 60(b)(6) only under exceptional circumstances. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988) (citing *Ackermann v. United States*, 340 U.S. 193 (1950)). As the court of appeals noted, generally a change in the law governing the case, after the case has been decided, is not alone sufficiently extraordinary to warrant such relief. *See, e.g., Biggins v. Hazen Paper Co.*, 111 F.3d 205, 212 (1st Cir. 1997), *cert. denied*, 522 U.S. 952 (1997); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628-30 (7th Cir. 1997); *Booker v. Singletary*, 90 F.3d 440, 442 (11th Cir. 1996); *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 750 (5th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272-74 (2d Cir. 1994), *cert. denied*, 513 U.S. 1001 (1994); *Dowell v. State Farm Fire & Cas. Auto Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993); *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 159-60 (5th Cir. 1990), *cert. denied*, 498 U.S. 829 (1990); *Tomlin v. McDaniel*, 865 F.2d

209, 211 (9th Cir. 1989); *Seese*, 679 F.2d at 337; *Carter v. Romines*, 593 F.2d 823, 824 (8th Cir. 1979); *Collins v. City of Wichita, Kan.*, 254 F.2d 837, 839 (10th Cir. 1958). This is true because concern for the finality of judgments weighs against granting relief even where, as here, a state court later disagrees with the decision of a federal court interpreting that state's law. *DeWeerth*, 38 F.3d at 1272-74; *Batts*, 66 F.3d at 749-50; *Cincinnati Ins. Co.*, 131 F.3d at 628-29. Any other rule would be "tantamount to holding that the doctrine of finality does not apply to diversity judgments, a theory that has no basis in *Erie* or its progeny." *DeWeerth*, 38 F.3d at 1273-74. KPERS has demonstrated no additional reasons that merit abandoning principles of finality in this case, particularly since application of the Kansas Supreme Court's 1997 to this case would not change the outcome as to Blackwell Sanders and similarly situated defendants, as discussed more fully below.

Equitable considerations also weigh strongly against reopening the judgment, and such considerations are fully relevant to a Rule 60(b) request. *See Woods v. Kenan*, 173 F.3d 770, 780 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 187 (1999); *Samaras v. America's Favorite Chicken Co.*, 153 F.3d 268, 272 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1251 (1999); *MIF Realty L.P. v. Rochester Assocs.*, 92 F.3d 752, 755-56 (8th Cir. 1996); *National Credit Union Admin Bd. v. Gray*, 1 F.3d 262, 266 (4th Cir. 1993); *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990); *Hugel v. McNell*, 886 F.2d 1, 6 (1st Cir. 1989); *Peacock v. Board of Sch. Comm'rs of Indianapolis*, 721 F.2d 210, 214 (7th Cir. 1983). As the courts below noted, KPERS's conduct in this litigation has been far from exemplary. Early in this case,

KPERS obtained an *ex parte* severance from a Kansas state court simply to frustrate removal. *KPERS v. Reimer & Koger Assoc., Inc.*, 4 F.3d 614 (8th Cir. 1993) (*KPERS I*), *cert. denied*, 511 U.S. 1126 (1994). Then KPERS filed parallel actions in state court for the purpose of subverting federal removal jurisdiction, *KPERS v. Reimer & Koger Assoc., Inc.*, 77 F.3d 1063, 1070 (8th Cir. 1996) (*KPERS IV*), *cert. denied*, 519 U.S. 948 (1996). The District Court concluded – and the Eighth Circuit agreed – that those suits were objectively unreasonable and brought in bad faith. *See KPERS v. Reimer & Koger Assoc., Inc.*, 165 F.3d 627, 629 (8th Cir. 1999) (*KPERS VIII*) (affirming award of attorneys fees against KPERS for unreasonably and vexatiously multiplying proceedings).

KPERS now suggests that it would be improper for it to be penalized for "asserting legitimate arguments against the exercise of federal court jurisdiction at the outset of the case, by denying [it] Rule 60(b)(6) relief to which [it is] otherwise entitled at the end of the case," when to obtain Rule 60(b) relief it must demonstrate that it made every effort to prevent the entry of the erroneous judgment. Petition at 20. But KPERS's efforts to oppose federal jurisdiction were *not* legitimate – it was sanctioned for improperly multiplying the litigation. And it cannot have been error for the courts below to consider KPERS's improper conduct in determining whether to exercise discretion and reopen a final judgment at KPERS's request. *Cf. Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 681 (11th Cir. 1984) ("[T]his case is replete with inexcusable delay and numerous unjustified violations of the court's orders, which fully support the court's denial of relief under Rule 60(b)(6)"); *see also MIF Realty*, 92 F.3d

at 755-56; *National Org. For Women v. Operation Rescue*, 47 F.3d 667, 669 (4th Cir. 1995) (per curiam); *Nalco Chem. Co. v. Hydro Tech., Inc.*, 148 F.R.D. 608, 617 (E.D. Wis. 1993); *Sony Corp. v. S.W.I. Trading Inc.*, 104 F.R.D. 535, 541 (S.D.N.Y. 1985).

This case presents nothing more than the unremarkable issue of whether Rule 60(b) can now be used to compel a different result than the one already reached twice before by both the District Court and the Eighth Circuit. This narrow issue is not worthy of the Court's attention.

II. This Court Should Not Grant the Petition Because, Even If the Lower Court Were Reversed, the Ultimate Outcome to Blackwell Sanders and Other Defendants Would Be the Same.

Not only does this case lack general precedential value, but granting the petition would not even change the outcome as to respondent Blackwell Sanders and similarly situated defendants. Even if petitioner receives the relief it requests and obtains retroactive application of the Kansas Supreme Court's 1997 decision, its claims against Blackwell Sanders would still be time barred.

In *KPERS III*, the Eighth Circuit concluded that (1) the limitations law of the forum – Missouri – governs this case, and (2) KPERS's claims are subject to a five-year Missouri statute of limitations, Mo. Rev. Stat. § 516.120, unless those claims are "fully barred" by a statute in the state in which the cause of action arose – Kansas, *id.* § 516.190. *KPERS III*, 61 F.3d at 614. KPERS has not

challenged the applicability of the Missouri five-year statute of limitations or the District Court's finding that KPERS's claims against respondents accrued on December 23, 1986.[6] Thus, even under the Kansas Supreme Court's decision in *KPERS v. Reimer & Koger Associates, Inc.*, 941 P.2d 1321 (1997), any party KPERS failed to sue by December 23, 1991 is entitled to summary judgment.

Because KPERS did not assert claims against Blackwell Sanders until January 6, 1995 – more than eight years after the limitations period began to run – those claims would be time-barred under the Missouri statute of limitations. Therefore, application of the Kansas Supreme Court's decision, which does not even address the applicability of the Missouri five-year statute of limitations, would not change the result in this case, and Blackwell Sanders would still be entitled to summary judgment. Basic principles of fairness and justice, including the fact that KPERS has kept Blackwell Sanders in court for over five years on clearly time-barred claims, dictate that the case against Blackwell Sanders and similarly situated respondents should not be reopened. 11 Charles Alan Wright, et al., Federal Practice And Procedure § 2857, at 262 (2d ed. 1995) (noting that under Rule 60 "[r]elief will not be given if substantial rights of the moving party have not been harmed by the judgment").

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[6] KPERS inexplicably maintains that all of these issues would be subject to reconsideration if this Court remands the case. The issues were properly before the court in *KPERS III* and KPERS should not be allowed to relitigate them.

CONCLUSION

KPERS's third certiorari petition, like its earlier two on substantially the same issue, should be denied.

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Dated: February 3, 2000

Supreme Court, U.S.
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CLERK

No. 99-1125

IN THE

Supreme Court of the United States

KANSAS PUBLIC EMPLOYEES
RETIREMENT SYSTEM, INC.,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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REPLY TO BRIEFS IN OPPOSITION

The Kansas Public Employees Retirement System, Inc. ("KPERS") respectfully submits this brief in reply to the two remaining briefs in opposition, those filed by respondents KPMG Peat Marwick LLP and Robert W.L. Spence ("KPMG Opp."), and by the Home Savings Association respondents, i.e., Sherman Dreiseszun, I.I. Ozar, and Thomas S. and Marilyn J. Morgan, co-executors of the Estate of Frank S. Morgan ("Dreiseszun Opp.").

KPERS has reached a settlement with the respondents that filed the other two opposition briefs, Shook Hardy & Bacon, and Blackwell Sanders Matheny Weary & Lombardi, L.L.P. The parties have filed with the Clerk agreed motions to dismiss the petition for certiorari as moot with respect to these respondents. Two respondents still in the case have not filed opposition briefs: Reimer & Koger Associates, Inc., and Kenneth H. Koger.

RESTATEMENT OF THE CASE

KPMG, and to a lesser extent the Home Savings Association respondents, hinge much of their opposition to certiorari on the claim that KPERS' statement of the case is materially inaccurate. Although many of the facts discussed by respondents are not relevant to the issues on which certiorari is being sought, KPERS is obliged to provide a response on these points. KPERS then answers the relatively limited attack that respondents concerning the reasons for granting the writ.

*1. **The portrayal of KPERS as an "innocent victim."*** KPMG asserts that the petition "grossly mischaracterizes" KPERS' status, supposedly portraying KPERS "as an innocent victim working always in good faith to obtain a definitive ruling on the applicable statute of limitations from the Kansas state courts." KPMG Opp. at 3. "In reality," KPMG argues, the Eighth Circuit held that KPERS "engaged in numerous abusive and manipulative litigation tactics. *Id.* at 3-4 (setting forth citations). The petition did not ignore these criticisms of KPERS. It specifically cited the portions of the decisions below

discussing these findings. Pet. at 16.[1]

KPERS does not deny that the district court and the Eighth Circuit have taken a dim view of the efforts of this agency of the State of Kansas to ensure that its claims against respondents, all arising under Kansas law, are adjudicated in the state courts of Kansas, not in Missouri federal court. Despite KPERS'

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[1] KPMG singles out two items in accusing KPERS of abusive litigation tactics. First, in the state-court litigation in Kansas in 1992, after respondents filed meritless third-party claims against the Resolution Trust Corporation (RTC) in an effort to obtain a federal forum, *see* Pet. at 6 n.4, KPERS won an order from the state trial judge severing the third-party claims, in an effort to protect its right to litigate the State's own claims arising under its own law in its own courts — while leaving undisturbed the right of the RTC to remove the spurious claims that had been made against it. KPMG describes this effort as "highly irregular," and cites the Eighth Circuit decision rejecting it. KPMG Opp. at 3 (citing *KPERS I*, 4 F.3d at 619); *see also* Dreiseszun Opp. at 4. But the petition specifically cited the passage in the Eighth Circuit decision below that relied in part on this same holding in *KPERS I*. Pet. at 16 (citing Pet. App. 6a (in turn citing *KPERS I* on the fact that "KPERS obtained an ex parte severance from the Kansas state court in order to frustrate removal")).

Second, in 1995 KPERS filed a motion to recuse the district court judge based on the cumulative impact of three conflicts: (a) the judge was an investor in the parent company of a bank that was a party in related litigation, which might be favorably impacted by rulings against KPERS; (b) the judge was the primary beneficiary of his mother's estate, which was currently being represented by one defendant in this case (Blackwell Sanders); and (c) the judge's daughter had just accepted a position as an associate with another defendant in the case (Shook, Hardy & Bacon) that could be severely damaged by adverse rulings by the judge. The judge declined to recuse himself, and the Eighth Circuit affirmed. *See In re KPERS*, 85 F.3d 1353 (8th Cir. 1996). The Eighth Circuit's decision, and the fact that the district court relied on it in denying KPERS Rule 60(b) relief, were noted in the petition. *See* Pet. at 16 (citing Pet. App. 11a (in turn citing *In re KPERS*, 85 F.3d at 1359-60)).

Respondents suggest without elaboration that the fact that the Eighth Circuit has entertained ten appeals in this case (some brought by various defendants), and that KPERS has filed four previous petitions for certiorari, means that KPERS has engaged in duplicative appellate litigation. KPMG Opp. at 2; Dreiseszun Opp. at 2. To the contrary, each appeal, and each prior petition for certiorari, raised quite distinct issues. Never have respondents sought sanctions on the theory that any of KPERS' appellate points have been duplicative of earlier appellate stages.

forthright admission that it filed its parallel litigation in Kansas state court in an effort to overcome what it viewed (correctly, as it turned out) as an erroneous statute-of-limitations ruling, *see* Pet. at 8-9, KPERS was sanctioned for these efforts. KPMG Opp. at 3-4; Dreiseszun Opp. at 6-7. These efforts were later held against KPERS when it sought Rule 60(b) relief at the end of the case. *See* Pet. at 15-16. The question presented is whether it is *permissible* to penalize a sovereign State for its efforts to litigate its own claims in its own courts — not whether KPERS can show that it was an "innocent victim" in every particular.

2. ***The suggestion that KPERS is arguing that this case is not properly in federal court.*** KPMG argues that KPERS "repeatedly complains that this case is not properly in federal court." KPMG Opp. at 4-5. That is not KPERS' argument. The petition does describe the manner in which the case was removed to federal court after the defendants sustained a loss on the statute-of-limitations issue — and in particular how the assertion of meritless third-party claims against the RTC provided the sole basis for removal. *See* Pet. at 5-6 & n.4. But this is not argued as an independent ground for certiorari; instead, it provides the context for KPERS' later efforts to pursue parallel litigation in the Kansas state courts as the only available means of obtaining an authoritative statute-of-limitations ruling. *See* Pet. at 8-9.[2]

3. ***The nature of the claims against respondents.*** KPMG notes that the only claims brought against it by KPERS sound in

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[2] KPMG states that KPERS' "representation that, after the claims against it were dismissed, the RTC had 'informed the district court that it had no further interest in the case remaining in federal court' (Pet. 6 n.4) is grossly misleading." KPMG Opp. at 4 n.1. We are unable to follow this point. The quotation that KPMG attributes to KPERS appears nowhere in Pet. at 6 n.4. That footnote accurately quotes the statement of the RTC's counsel, made in open court, setting forth the RTC's assumption that after it won dismissal the case would go back to state court, as the only reason the RTC had removed the case was to litigate its motion to dismiss in federal court. In the end, KPMG does not dispute that after winning dismissal the RTC (as made clear by the quoted statement of its counsel) took the "position that there was no reason for the case to remain in federal court." Pet. at 6 n.4.

negligence, and suggests that the petition's characterization of the case is "false." KPMG Opp. at 5. KPMG is mistaken. The petition's thumbnail description of the case did not suggest that every respondent was sued for fraud. *See* Pet. at 2, 4, 21.

4. ***The holdings of the district court and the Eighth Circuit below.*** KPMG claims that the petition falsely represents that the district court denied KPERS' Rule 60(b) motion based "solely on petitioner's 'unclean hands.'" KPMG Opp. at 5. KPMG then summarizes all of the grounds set out by the district court in its decision. *Id.* at 5-7. But the petition nowhere suggested that the "unclean hands" theory was the *sole* ground of the district court's decision. The petition focused on this ground because it *was*, undoubtedly, the sole basis of the Eighth Circuit's *affirmance* of the district court, *see* Pet. at 16, and it is the Eighth Circuit's decision that is the subject of the petition — as of course it must be. Finally, KPMG suggests that the petition falsely represents that the Eighth Circuit made a "finding that 'existing federal appellate precedent, applied in light of five extraordinary factors present in this case, required granting the relief requested.'" KPMG Opp. at 7 (citing Pet. at 16); *see also* Dreiseszun Opp. at 13 & n.6. The petition stated only that the Eighth Circuit "did not dispute KPERS' showing that existing federal appellate precedent" required the granting of Rule 60(b) relief — and that the Eighth Circuit rested its affirmance solely on an "unclean hands" theory that withheld Rule 60(b) relief (in part) based on KPERS' earlier efforts to litigate the State's own claims, arising under its own law, in its own courts. Pet. at 16. These points are unchallenged. It is the propriety of a court resting on that theory that is the basis of the petition.

REASONS FOR GRANTING THE WRIT

KPERS set forth three reasons for granting the writ. First, the Eighth Circuit's approach to Rule 60(b) conflicts with the decisions of this Court and of the Second, Fourth, Fifth and D.C. Circuits, which emphasize that the Rule 60(b) equitable balancing weighs the general interest in finality against the

specific interest in the justice of the result in the particular case. *See* Pet. at 17-19. Here, respondents cite Fourth Circuit and Eleventh Circuit decisions that add an "unclean hands" analysis to the mix. KPMG Opp. at 9-11; Dreiseszun Opp. at 17-18. By illustrating that the Eighth Circuit is hardly alone in its approach to Rule 60(b), these cases simply bolster the argument for certiorari. Further, respondents cite no cases supporting the use of an "unclean hands" theory against a governmental agency such as KPERS (or even a private entity advancing important public purposes), a novel approach. *See Perma Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968); *E.E.O.C. v. Recruit U.S.A., Inc.*, 939 F.2d 746, 752-54 (9th Cir. 1991); *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1546-47 (E.D. Cal. 1992). Nor do they cite authority for using an "unclean hands" analysis to penalize a litigant for earlier, unrelated conduct; there is none. *See Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R.*, 417 U.S. 703, 717-18 n.14 (1974); *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933); *American Hosp. Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 601 (7th Cir. 1985) (Posner, J.).

Second, the Eighth Circuit's approach to Rule 60(b) penalizes litigants who seek to defend their forum choice and to obtain authoritative rulings on state-law issues — thereby denying Rule 60(b) relief based on the very actions that may be required to qualify for such relief in the first place. *See* Pet. at 19-20. Respondents offer no defense of this approach.

Third, at minimum certiorari should be granted to reverse the affront to vital principles of federalism posed by the Eighth Circuit's holding that a sovereign State may be regarded as having "unclean hands" based (in part) on its efforts to litigate its own claims, arising under its own law, in its own courts. *See* Pet. at 21-23. Respondents do not defend this holding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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